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No. 03-

IN THE

Supreme Court of the United States

WILLIAM A. BORDERS, JR.,

Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF BAR COUNSEL,

Respondent.

On Petition For Writ Of Certiorari To The District Of Columbia Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

KENNETH W. STARR
KANNON K. SHANMUGAM
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

CHARLES J. OGLETREE, JR.
Counsel of Record
HARVARD LAW SCHOOL*
516 Hauser Hall
Cambridge, MA 02138
(617) 495-5097

* *affiliation given for associational purposes only*

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QUESTION PRESENTED

Whether, under Article II, section 2, clause 1 of the United States Constitution, a presidential pardon nullifies disabilities imposed solely on the basis of the underlying criminal conviction.

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INTRODUCTION

This case presents an interesting and important question of constitutional law relating to the scope of the President's pardon power. The District of Columbia's highest court held that an attorney who was disbarred as a result of a criminal conviction, and who later received a presidential pardon for that conviction, was not entitled to reinstatement to the Bar — notwithstanding the fact that his disbarment was based *solely* on the subsequently pardoned conviction. That decision conflicts with a venerable line of this Court's cases dating from the Civil War, which make clear that a presidential pardon "blots out" not only the conviction itself, but also any disabilities that attach as a result of the conviction. It also conflicts with the decision of the Seventh Circuit in *Bjerkan v. United States*, 529 F.2d 125 (1975), which specifically recognized that a State's deprivation of the right to work on the basis of a pardoned conviction would constitute an impermissible disability.

If allowed to stand, the decision below will have drastic consequences for the recipients of presidential pardons. Many States impose substantial disabilities on individuals who are convicted of state or federal felonies, including limitations on the right to vote, the right to carry firearms, and (as here) the right to be admitted to the Bar. By allowing such disabilities to remain in effect even where the underlying conviction has been wiped off the books, the lower court imposed draconian restrictions on the President's pardon power, potentially rendering the exercise of that power a purely symbolic act. While the use of the pardon power may often be controversial, there can be no doubt that the power is a muscular one. Because the decision below conflicts with the decisions of this Court and a federal court of appeals, and because it threatens to curtail a fundamental enumerated power, *certiorari* should be granted.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 797 A.2d 716 and reprinted in the appendix ("App.") at 5a-9a. The unreported order denying the petition for rehearing *en banc* is reprinted at App. 1a-4a.

JURISDICTION

The D.C. Court of Appeals entered judgment on May 2, 2002. Petitioner timely filed a petition for rehearing *en banc*, which was denied on April 16, 2003. On July 1, 2003, the Chief Justice extended the time for filing this petition until August 14, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a)-(b).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article II, section 2, clause 1 of the United States Constitution states, in relevant part, as follows:

> The President * * * shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Section 11-2503(a) of the D.C. Code states as follows:

> When a member of the bar of the District of Columbia Court of Appeals is convicted of an offense involving moral turpitude, and a certified copy of the conviction is presented to the court, the court shall, pending final determination of an appeal from the conviction, suspend the member of the bar from practice. Upon reversal of the conviction the court may vacate or modify the suspension. If a final judgment of conviction is certified to the court, the name of the member of the bar so convicted shall be struck from the roll of the members of the bar and such person shall thereafter cease to be a member. Upon the granting of a pardon to

a member so convicted, the court may vacate or modify the order of disbarment.

STATEMENT OF THE CASE

1. Petitioner William A. Borders, Jr., is 64 years old. He was once a prominent attorney and president of the National Bar Association, the Nation's leading organization of African-American lawyers. More than twenty years ago, he was convicted in federal court of conspiracy to solicit bribes from criminal defendants in exchange for lenient treatment by his friend, United States District Judge Alcee L. Hastings. *See United States v. Borders*, 693 F.2d 1318, 1319 (11th Cir. 1982).[1] The Eleventh Circuit affirmed the conviction, *see id.* at 1330, and this Court denied *certiorari*, *see* 461 U.S. 905 (1983). Borders was sentenced to five years in prison. *See Borders*, 693 F.2d at 1319.

In 1983, the D.C. Court of Appeals disbarred Borders in an unpublished order. *See* App. 10a-11a. In doing so, the court relied solely on D.C. Code § 11-2503(a), which requires disbarment when a member of the Bar is "convicted of an offense involving moral turpitude." *See* App. 11a. Because disbarment attached automatically under this provision as a result of Borders' *convictions*, *see In re McBride*, 602 A.2d 626, 630 n.4 (D.C. 1992), the court did not reach the issue whether sanctions were appropriate for Borders' underlying *conduct* under other potentially applicable disciplinary provisions.[2]

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[1] Hastings was acquitted of criminal charges, but was subsequently impeached and removed from the bench. In 1992, he was elected to Congress, where he now serves as the ranking Democrat on the House Permanent Select Committee on Intelligence. *See* William Raspberry, *Pardoned But Still Disbarred*, Wash. Post, June 23, 2003, at A21.

[2] For example, D.C. Rule of Professional Conduct 8.4 (like its predecessor provision in the D.C. Code of Professional Responsibility) states that "[i]t is professional misconduct for a lawyer to * * * [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation," or to "[e]ngage in conduct

In 1993, Borders filed a petition for reinstatement with the D.C. Board on Professional Responsibility. That petition was denied, and the D.C. Court of Appeals affirmed the denial. *See In re Borders*, 665 A.2d 1381, 1385 (D.C. 1995). The court acknowledged that Borders had expressed remorse for his conduct and was competent to practice law, *see id.* at 1383, and recognized his "admittedly impressive character witnesses," *id.* at 1385. Nevertheless, it affirmed the denial of reinstatement on the ground that Borders had not testified against Hastings or provided an explanation for his conduct. *See id.* at 1383-85.

In 1998, Borders filed a second petition for reinstatement with the Board on Professional Responsibility. That successive petition was also denied, and no appeal was taken.

2. On his last day in office — January 20, 2001 — President Clinton issued a full and unconditional pardon to Borders. *See* App. 5a-6a. Borders subsequently filed a motion in the D.C. Court of Appeals to vacate its original order of disbarment, on the ground that the presidential pardon automatically nullified the disbarment, as well as the federal convictions on which the disbarment was solely based. *See id.* at 6a.

The D.C. Court of Appeals denied the motion. *See id.* at 5a-9a. The court reasoned that the relevant statute, D.C. Code § 11-2503(a), permitted, but did not require, the court to order reinstatement. *See id.* at 6a-7a. The court relied heavily on its prior decision in *In re Abrams*, 689 A.2d 6 (D.C. 1997) (*en banc*), in which it held, by a 5-4 margin, that reinstatement was not constitutionally required where the original disbarment rested on independent findings about the petitioner's underlying *conduct*. In response to Borders' argument that reinstatement was constitutionally required here because the disbarment

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that seriously interferes with the administration of justice." Unlike D.C. Code § 11-2503(a), however, Rule 8.4 does not specify any particular sanction for its violation.

rested solely on the pardoned *conviction*, *see* C.A. Mot. to Vacate 3, the court recognized that there was language in *Abrams* to that effect, *see* App. 8a.[3] But it summarily distinguished that language as dicta. *See id.* The court suggested that Borders could again petition for reinstatement with the Board on Professional Responsibility, but noted that the presidential pardon would be only one factor to be taken into account in the consideration of that petition. *See id.* at 9a. Judge Steadman reluctantly concurred, noting that he was bound by the Court's earlier decision in *Abrams* (from which he had dissented). *See id.*

Borders then filed a petition for rehearing *en banc*. Almost ten months after the petition was filed, the *en banc* court denied the petition by a 4-3 vote, with two of the court's nine members recusing themselves. *See id.* at 1a-2a. Judge Reid, joined by Chief Judge Wagner and Judge Washington, dissented and filed a separate opinion. *See id.* at 2a-4a. She reasoned that the case presented the "purely legal" issue of whether Borders was entitled to automatic reinstatement, and therefore that it was improper to require Borders to petition for reinstatement. *Id.* at 2a-3a. This petition follows.

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[3] In *Abrams*, the court stated as follows:

> Bar Counsel has not asked the court to disbar Abrams on account of his having been convicted of a crime of moral turpitude. *Cf. In re Hopmayer*, 625 A.2d 290 (D.C. 1993); D.C. Code § 11-2503(a) (1996). The presidential pardon would undoubtedly have precluded a sanction based on Abrams' conviction, and Abrams did not, in any event, commit such a crime.

689 A.2d at 11.

REASON FOR GRANTING THE WRIT

THE D.C. COURT OF APPEALS ERRED BY HOLDING THAT A PRESIDENTIAL PARDON DOES NOT NULLIFY DISABILITIES IMPOSED SOLELY ON THE BASIS OF THE UNDERLYING CONVICTION.

This Court should grant *certiorari* because the decision below conflicts with numerous decisions from this Court and with the decision of a federal court of appeals, and because the petition presents a recurring question of exceptional importance. *See* S. Ct. R. 10.

A. The Decision Below Conflicts With Prior Decisions Of This Court.

This Court has long held that a presidential pardon nullifies not only the pardoned conviction itself, but also any disabilities that attach as a result of the conviction. The D.C. Court of Appeals' decision simply cannot be reconciled with this Court's Pardon Clause cases.

1. Article II, section 2, clause 1 of the United States Constitution states, in relevant part, that "[t]he President * * * shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." This Court has noted that, aside from the exception for impeachment, the President's pardon power was understood at the time of the Framing to have the same scope as that exercised by the King of England. *See Ex parte Grossman*, 267 U.S. 87, 112-13 (1925) (rejecting proposition that "there is any substantial difference * * * between the executive power of pardon in our government and the king's prerogative"); *Ex parte Wells*, 59 U.S. (18 How.) 307, 311 (1855) (noting that, "when the words [']to grant pardons['] were used in the constitution, they conveyed to the mind the authority as exercised by the English crown"); *cf.* The Federalist No. 69, at 418-19 (Clinton Rossiter ed. 1961) (Alexander Hamilton) (comparing the President's pardon power to that of the

Governor of New York). Under English law, the King's pardon power unambiguously extended not only to the underlying criminal conviction itself, but also to "all the dependencies, penalties, and disabilities incident unto it." *Cuddington v. Wilkins*, 80 Eng. Rep. 231, 232 (K.B. 1614).

2. In a long line of cases in the immediate aftermath of the Civil War, this Court expressly affirmed the principle that the President's pardon power extended to any disabilities that attach as a result of the pardoned conviction.

The seminal case on the President's pardon power remains *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). That case, like many of the others in the line, involved a Confederate official who was pardoned for his wartime actions. *See id.* at 375. Petitioner was a member of this Court's Bar who had served in the Confederate Congress. *See id.* In 1865, the United States Congress passed a law requiring all members of the Supreme Court Bar to take a loyalty oath, stating, *inter alia*, that they had never served an enemy of the United States. *See id.* at 374-75, 376. Petitioner sought permission to continue as a member of the Bar without taking the loyalty oath, contending that the pardon relieved him of any obligation to take the oath. *See id.* at 375.

The Court granted the petition, based in part on its interpretation of the pardon power. *See id.* at 381. In an oft-quoted passage on the "effect and operation" of that power, the Court stated as follows:

> A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; *if granted after conviction, it*

> *removes the penalties and disabilities, and restores him to all his civil rights*; it makes him, as it were, a new man, and gives him a new credit and capacity.

Id. at 380-81 (emphasis added). *Garland* therefore stands not only for the general proposition that the President's pardon power nullifies any disabilities that attach as a result of the pardoned conviction, but also for the specific proposition that deprivation of the ability to practice law constitutes a "disability" or "punishment" that can be nullified by a pardon. *See id.* at 377 (noting that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866) (noting, in companion case to *Garland*, that "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment").[4]

In *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869), the plaintiff sought to recover the proceeds of seized property under the Captured and Abandoned Property Act, which required the claimant to show that he had never given any aid or comfort to the Confederacy. *See id.* at 537-38. Citing *Garland*, the Court held that, as a result of his pardon for his involvement with the Confederacy, the plaintiff was "purged of whatever offence against the laws of the United States he had committed * * * and relieved from any penalty which he might have incurred." *Id.* at 543. The Court therefore concluded that the plaintiff's right to the property "remain[ed] perfect," and allowed the plaintiff to recover the proceeds. *Id.*

The Court reached a similar result in *Carlisle v. United States*, 83 U.S. (16 Wall.) 147 (1872). *Carlisle* involved plaintiffs who, like the plaintiff in *Padelford*, had received

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[4] This Court has described bar disciplinary proceedings as "adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 551 (1968).

presidential pardons and were attempting to recover property under the Captured and Abandoned Property Act. The Court recognized that "[t]here has been some difference of opinion among the members of the court as to cases covered by the pardon of the President, but there has been none as to the effect and operation of a pardon in cases where it applies." *Id.* at 151. The Court noted that "[a]ll have agreed that the pardon not merely releases the offender from the punishment prescribed for the offence, but that it obliterates in legal contemplation the offence itself." *Id.*

In *Osborn v. United States*, 91 U.S. 474 (1875), another case involving the confiscation of property, the Court again restored proceeds as a result of a presidential pardon. The Court reasoned that "[i]t is of the very essence of a pardon that it releases the offender from the consequences of his offence," *id.* at 477, and added that "the penalty of forfeiture annexed to the commission of the offence must fall with the pardon of the offence itself," *id.* Citing *Carlisle*, the Court concluded that the pardon "releas[es] the offence, obliterat[es] it in legal contemplation, [and] removes the ground of the forefeiture upon which the decree rests." *Id.* at 478 (citation omitted).

Finally, in *Knote v. United States*, 95 U.S. 149 (1877), another confiscation case, the Court gave perhaps its fullest post-*Garland* exposition of the scope of the pardon power. In again restoring proceeds from confiscated property to the recipient of a presidential pardon, the Court characterized a pardon as "an act of grace" that "releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights." *Id.* at 153. The Court observed that a pardon "gives [the recipient] a new credit and capacity, and rehabilitates him to that extent in his former position" and added that "it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights." *Id.*

3. Notably, the Court has applied similar principles in

determining the effect of a presidential pardon on disabilities that attach by operation of *state*, as well as *federal*, law.[5] In *Carlesi v. New York*, 233 U.S. 51 (1914), the Court considered whether New York could treat a defendant as a repeat offender for sentencing purposes on the basis of a prior federal conviction for which the defendant had been pardoned. *See id.* at 55-56. The Court upheld the defendant's sentence, but on the narrow ground that the defendant was being "punished" only for the new offense, not for the prior one. *See id.* at 57-58; *cf. Gryger v. Burke*, 334 U.S. 728, 732 (1948) (rejecting double-jeopardy challenge to repeat-offender statute on ground that sentence constituted "a stiffened penalty for the latest crime," rather than a second penalty for the earlier one). The Court expressly stated that, "if the act of the state in taking into consideration a prior conviction of [a federal offense] despite a pardon was in any just sense a punishment for such prior crime, * * * the act of the state would be void because destroying or circumscribing the effect of the pardon granted." *Carlesi*, 233 U.S. at 57. The Court therefore recognized that state disabilities based on a pardoned conviction, like federal ones, would fall along with the conviction itself.

4. Since the Court's decisions in the post-Civil War pardon cases, commentators have recognized that a presidential pardon nullifies at least those disabilities that attach automatically as a result of the conviction itself, even if it does not "blot out guilt" in a more generic sense by nullifying disabilities that are based on the same conduct that underlies the conviction.[6] In a

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[5] The District of Columbia Code, of course, is enacted by Congress and thus constitutes federal law. *See, e.g., Palmore v. United States*, 411 U.S. 389, 398 (1973).

[6] Where a disability imposed by state law is based on the conduct that underlies a federal conviction, that disability is analogous to a state criminal sanction for that conduct. This Court's double-jeopardy jurisprudence recognizes that "an act denounced as crime by both national and state sovereignties is an offense against the piece and dignity of both and may be punished by each." *United States v. Lanza*, 260 U.S. 377, 382 (1922).

frequently cited law-review article on the scope of the pardon power, Professor Samuel Williston drew precisely this distinction in discussing the Court's post-Civil War decisions:

> The true line of distinction seems to be this: The pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications *which would not follow from the commission of the crime without conviction*, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of the crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv. L. Rev. 647, 653 (1915) (emphasis added).

Similarly, the Office of Legal Counsel, in a 1995 memorandum, recognized this distinction in the specific context of sanctions imposed on attorneys for conduct that is the subject of a pardoned conviction:

> For example, an attorney charged with a criminal offense for which he or she is later pardoned by the President would be relieved of all consequences *that attached solely by reason of his commission of the offense*. However, the pardon would not necessarily prevent a local or state bar from disciplining the attorney, *if it independently determined that the underlying conduct, or some portion of it, violated one of its canons of ethics*. In those instances, the bar would not have based its decision to disbar or sanction the attorney on the fact that the attorney had violated the criminal laws of the United States, but rather would have conducted an inquiry into the conduct and determined that an ethical violation had occurred.

Office of Legal Counsel, United States Department of Justice, Memorandum for the Pardon Attorney, June 19, 1995, *available at* http://www.usdoj.gov/olc/pardon3.19.htm (emphases added).

At a minimum, therefore, because the disbarment here "attached solely by reason of" the pardoned conviction, and because there was no "independent[] determin[ation]" that the underlying conduct violated the D.C. Code of Professional Responsibility, the disbarment, like the conviction on which it was based, must fall. To the extent that D.C. Code § 11-2503(a) suggests that reinstatement to the Bar is permissive, rather than mandatory, in these circumstances, it is inconsistent with the President's pardon power, and therefore must yield. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring in the judgment); *Schick v. Reed*, 419 U.S. 256, 266 (1974); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1871). The D.C. Court of Appeals' decision not to reinstate petitioner contravenes this Court's longstanding view of the scope of the President's pardon power, and *certiorari* is therefore warranted.

B. The Decision Below Conflicts With A Decision Of A Federal Court of Appeals.

The D.C. Court of Appeals' decision is in conflict not only with numerous cases from this Court, but also with the Seventh Circuit's decision in *Bjerkan v. United States*, 529 F.2d 125 (1975). *Certiorari* is warranted on this basis as well.

In *Bjerkan*, the court considered whether a pardoned individual, who was no longer serving time in prison by virtue of his pardon, was nevertheless in "custody" for purposes of pursuing a § 2255 petition. The petitioner relied on *Carafas v. LaVallee*, 391 U.S. 234 (1968), in which this Court held that a habeas petitioner could be in "custody" (and thereby pursue his petition) even if he was no longer in prison, due to the "collateral consequences" that flowed from a prior conviction,

such as the loss of the rights to vote, serve on a jury, and work in certain professions. *See id.* at 237-38. The question presented in *Bjerkan*, therefore, was "whether a full pardon eliminates all 'collateral consequences' of the petitioner's conviction," thereby barring him from pursuing his habeas petition. *Bjerkan*, 529 F.2d at 126.

The Seventh Circuit held that it did, and therefore concluded that the case was moot. The court reasoned that a pardon "restores all [of a person's] basic civil rights, both state and federal." *Id.* at 127. Relying on this Court's decision in *Carlesi*, the Seventh Circuit reasoned that a State "may not take cognizance of the offense pardoned in any way which would constitute a 'punishment.'" *Id.* at 127-28. The court reasoned that "[c]ommon sense would seem to indicate that the deprivation of certain basic civil rights resulting from a felony conviction constitutes a 'punishment.'" *Id.* at 128. Citing this Court's decision in *Cummings* (the sister case to *Garland*), and Professor Williston's article on the scope of the pardon power, the court concluded that "any deprivation of a person's basic civil rights, including the right to vote, the right to serve on juries and *the right to work in certain professions*, by a state on account of a federal conviction would constitute a punishment." *Id.* at 128 & n.2 (emphasis added). The court added that, "[i]f the conviction were pardoned, as it was here, such attempted punishment would constitute a restriction on the legitimate, constitutional power of the President to pardon an offense against the United States and would be void as circumscribing and nullifying that power." *Id.* at 128.

The Seventh Circuit proceeded to reject the argument that allowing a presidential pardon to nullify disabilities created by state law would raise federalism concerns. The court acknowledged that the Pardon Clause gave the President the power to pardon only federal crimes, but reasoned that the President's power with regard to those crimes was plenary:

> In regard to the pardon power, the President's sphere is limited. He can only pardon those offenses which are "against the United States." But in this sphere, his power, like any constitutional power, must be supreme. It cannot be hindered by the operation of the subordinate governments. The pardon power would be ineffective if it could only restore a convict's federal civil rights. The pardoned person would still suffer numerous handicaps and would not receive the benefits of what the President in granting a full pardon would seem to intend — that the person be reinstated to his full rights as a citizen.

Id. at 129. The court concluded that "the power to punish for a conviction which has been pardoned is the power to vitiate and destroy a presidential pardon." *Id.*

The Seventh Circuit's decision in *Bjerkan* simply cannot be reconciled with the decision below. The Seventh Circuit expressly held that a presidential pardon nullifies *all* disabilities — including a disability that affects the "right to work in certain professions" — which attach solely by virtue of the underlying federal conviction. The disability at issue in this case falls squarely into this category: indeed, that disability, unlike the disabilities discussed in *Bjerkan*, arises solely by operation of federal, rather than state, law. *See supra* note 5. This Court's intervention is warranted to resolve this stark conflict on a fundamental question of constitutional law.[7]

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[7] A number of state courts, citing this Court's precedents on the scope of the federal Pardon Clause, have reached the identical conclusion as the *Bjerkan* court with respect to the scope of a governor's pardon power under analogous state constitutional provisions — often in the specific context of cases involving attorneys seeking readmission to the Bar. *See, e.g., Scott v. State*, 25 S.W. 337, 339 (Tex. Ct. Civ. App. 1894) (holding that pardoned attorney disbarred under automatic-disbarment provision for persons "convicted of a felony" was entitled to reinstatement on ground that disbarment was founded on a statute "declaring the effect of the felony

C. The Question Presented Is A Recurring One Of Exceptional Importance.

Finally, the D.C. Court of Appeals' decision will have potentially enormous consequences for the many recipients of presidential pardons.[8] Many States impose substantial disabilities on individuals who are convicted of felonies (whether state or federal), including permanent or temporary restrictions on the rights to vote, carry firearms, accept public employment, serve as jurors, hold public office, retain child custody, and (as here) serve as a member of the Bar. *See* Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction*, Fed. Probation, Sept. 1996, at 10, 11-14. In fact, the extent to which States restrict the rights of felons has been increasing in recent years. *See id.* at 14-15. The implications of the D.C. Court of Appeals' decision are therefore breathtakingly broad. By allowing disabilities that depend solely on a federal conviction to remain in effect even when the conviction has been nullified by a full and unconditional presidential pardon,[9] the decision below greatly

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conviction," rather than on "facts showing professional misconduct"); *In re Enmons*, 154 P. 619, 621 (Cal. Ct. App. 1915) (same); *Ex parte Crisler*, 132 So. 103, 104 (Miss. 1931) (likewise reinstating attorney and distinguishing between cases in which attorney is disbarred "as part of the punishment for the commission of the crime" and cases in which attorney is disbarred "on account of professional misconduct involved in the transaction which culminated in his conviction and pardon"); *Slater v. Olson*, 299 N.W. 879, 880-81 (Iowa 1941) (stating that pardon of applicant for civil service "relieves [him] not only from the punishment which the law inflicts for the crime but also exempts him from additional penalties and legal consequences in the form of disqualifications or disabilities based on his conviction").

[8] President Clinton, for example, took some 456 clemency actions (a figure that comprises both pardons and commutations). *See* Richard W. Stevenson, *A Presidential Power This President Uses Rarely*, N.Y. Times, Dec. 25, 2002, at A19.

[9] Of course, the President could impose restrictions or conditions on a pardon, thus allowing any preexisting disability to remain in place.

limits the scope of the presidential pardon power — rendering the exercise of that power a pure formality where, as here, the recipient of the pardon has already completed his or her sentence for the crime.

More than a century ago, this Court held that a presidential pardon restored a convicted felon's capacity to testify, reasoning that the pardon obliterated any "consequence * * * of the judgment of conviction." *See Boyd v. United States*, 142 U.S. 450, 454 (1892).[10] At least where the deprivation turns solely on the fact of conviction, there is no reason to treat deprivation of the right to practice one's chosen profession any differently from deprivation of the right to testify, or of any other right.[11] The D.C. Court of Appeals' decision has sweeping implications and is inconsistent with fundamental constitutional principles. *Certiorari* should be granted.

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[10] Lower state courts have likewise held that presidential pardons nullify other disabilities. *See, e.g., Harbert v. Deukmeijan*, 117 Cal. App. 3d 779, 781-82 (Cal. Ct. App. 1981) (right to carry firearms); *Damiano v. Burge*, 481 S.W.2d 562, 564-67 (Mo. Ct. App. 1972) (right to apply for liquor license).

[11] As noted above, *see supra* note 2, if the D.C. Office of Bar Counsel decides that the twenty-year suspension already served by petitioner is somehow insufficient punishment, it can always commence new disciplinary proceedings against petitioner under other potentially applicable provisions, *see In re Muckelroy*, 609 A.2d 265, 271 (D.C. 1992) (noting that there is no limitations period for disciplinary violations in the District of Columbia).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for *certiorari*.

Respectfully submitted,

KENNETH W. STARR
KANNON K. SHANMUGAM
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

CHARLES J. OGLETREE, JR.
Counsel of Record
HARVARD LAW SCHOOL*
516 Hauser Hall
Cambridge, MA 02138
(617) 495-5097

* *affiliation given for associational purposes only*

August 14, 2003

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APPENDIX A

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 01-BG-1592

IN RE: WILLIAM A. BORDERS, JR.,

Petitioner.

April 16, 2003

Before **WAGNER**, Chief Judge; *[*]* **TERRY, STEADMAN, SCHWELB, FARRELL, RUIZ, REID, GLICKMAN,** and **WASHINGTON,** Associate Judges.

ORDER

PER CURIAM:

On consideration of petitioner's petition for rehearing en banc, the unopposed motion of the Reverend Walter E. Fauntroy to file the lodged amicus brief, the lodged amicus brief of the Reverend Walter E. Fauntroy, the motion for leave to file an amended petition for initial hearing en banc, filed by Congressman Elijah Cummings, Congressman James Clyburn, Congressman Earl Hilliard, Congressman Bennie Thompson, et al., construed as a motion to file an amici curiae brief, the motion for leave to file a brief in support of petitioner's petition for rehearing en banc, the lodged amici curiae brief, Bar Counsel's unopposed motion for leave to file an opposition

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[*] Associate Judges Terry and Glickman are recused from this case.

exceeding ten pages, and Bar Counsel's lodged opposition, and it appearing that a majority of the judges of this court in regular active service have not voted to grant the petition for rehearing en banc, it is

ORDERED that the unopposed motion of the Reverend Walter E. Fauntroy to file the lodged amicus brief is granted and the Clerk is directed to file the lodged amicus brief of the Reverend Walter E. Fauntroy. It is

FURTHER ORDERED the motion for leave to file an amended petition for initial hearing en banc filed by Congressman Elijah Cummings, Congressman James Clyburn, Congressman Earl Hilliard, Congressman Bennie Thompson, et al., construed as a motion for leave to file the lodged amici curiae brief in support of petitioner's petition for rehearing en banc is granted and the Clerk is directed to file the lodged amici curiae brief. It is

FURTHER ORDERED that Bar Counsel's unopposed motion for leave to file the lodged opposition exceeding ten pages is granted and the Clerk is directed to file Bar Counsel's lodged opposition. It is

FURTHER ORDERED that the petition for rehearing en banc is denied.

Chief Judge Wagner, Associate Judges Reid and Washington would grant the petition for rehearing en banc.

Statement of Associate Judge **REID**, with whom Chief Judge **WAGNER** and Associate Judge **WASHINGTON** concur:

I believe we should grant Mr. Borders' petition for rehearing en banc. I am not persuaded that *In re Abrams*, 689 A.2d 6 (D.C. 1997) (en banc), in which I joined three of my colleagues in dissent, stands as a bar to the full court's consideration of the panel decision denying Mr. Borders' recent petition for automatic reinstatement based on a Presidential pardon. Since we are confronted with a purely legal issue and a question

involving interpretation of our decision in *Abrams*, *supra*, as well as other interpretation issues, it makes little sense to me to compel Mr. Borders, who was disbarred in 1983, to file another formal petition for reinstatement before the Board on Professional Responsibility, only to have the matter return to us at a much later point in time for consideration of the same legal and interpretation issues on which a division of this court already has opined, and for which we now have a petition for rehearing en banc.

Simply put, I believe it is procedurally unfair for this court to put Mr. Borders through an unnecessary step. Disbarred since 1983, he has now been given a President pardon for the convictions that served as the basis for his disbarment,[1] and the decision whether to reinstate him "is ours alone." *In re Roundtree*, 503 A.2d 1215, 1217 (D.C. 1985). Customarily, we prefer to have the Board on Professional Responsibility's input before rendering a decision, but this is an unusual case and the Board, understandably, would benefit from our guidance, within the context of this case and controversy. Indeed, the Board's report on Mr. Borders' prior reinstatement petition specifically lifted up a key precedent from this court, *In re McBride*, 602 A.2d 626 (D.C. 1992) (en banc) in stating: "*McBride* raises extremely difficult judgments on which the Board will need guidance from the court."

Given the division of this court in *Abrams*, *supra*, and that decision's pivotal role in the panel's consideration of Mr. Borders' petition for automatic reinstatement, *In re Borders*, 797 A.2d 716 (D.C. 2002), it would not be surprising if the Board again noted its need for guidance not only regarding *Abrams* but also *McBride*, *supra*. The panel decision denying

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[1] "Petitioner was disbarred in 1983 on the basis of four 1982 federal convictions arising out of his role in a conspiracy to solicit a bribe from criminal defendants in exchange for lenient treatment by a United States District Court judge." *In re Borders*, 665 A.2d 1381, 1386 (D.C. 1995) (King, J., concurring).

automatic reinstatement focused on language from *McBride*, including the following statement: "[I]n passing, [the *McBride* court] pointed out that * * * the House Committee on the Judiciary 'explained that a pardon would not automatically reverse any disbarment; rather, the decision to reinstate after a pardon remained with the court.'" *In re Borders*, 797 A.2d at 717 (quoting *McBride*, *supra*, 602 A.2d at 639 n.23 (other citation omitted)). The panel's use of that passage and the panel's interpretation of D.C. Code § 11-2503(a), *Abrams*, and *McBride*, may or may not be persuasive to the full court. Consequently, in my view, it makes sense to consider these legal and interpretation issues now, given this court's weighty obligation, "alone," to determine whether Mr. Borders should be reinstated to the practice of law.

APPENDIX B

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 01-BG-1592

IN RE: WILLIAM A. BORDERS, JR.,

Petitioner.

May 2, 2002

Before **STEADMAN** and **FARRELL**, Associate Judges, and **KING**, Senior Judge.

FARRELL, Associate Judge:

Petitioner was disbarred from the practice of law in the District of Columbia following an unsuccessful appeal of his 1982 federal convictions for conspiracy, obstruction of justice, and unlawful travel in interstate commerce with intent to commit bribery. Under this court's decisions, these crimes each involved moral turpitude, *see In re Borders*, 665 A.2d 1381, 1382 (D.C. 1995), requiring his disbarment under D.C. Code § 11-2503(a) (2001).[1] On January 20, 2001, President William J.

[1] That section provides in full: When a member of the bar of the District of Columbia Court of Appeals is convicted of an offense involving moral turpitude, and a certified copy of the conviction is presented to the court, the court shall, pending final determination of an appeal from the conviction, suspend the member of the bar from practice. Upon reversal of the conviction the court may vacate or modify the suspension. If a final judgment of conviction is certified to the court, the name of the member of the bar so convicted shall be struck from the roll of the members of the bar and such person shall thereafter cease to be a member. Upon the granting of

Clinton granted petitioner a full and unconditional pardon. Petitioner now, rather than seek reinstatement via a petition filed with the Board on Professional Responsibility, see D.C. Bar R. XI, § 16(d) (2001), asks the court to reinstate him automatically by virtue of the pardon, contending that "this Court must use its authority under D.C. Code § 11-2503 and modify or vacate Mr. Borders's disbarment by reinstating him to the D.C. Bar." We deny the petition without prejudice to the filing of a proper petition for reinstatement before the Board, in which petitioner may urge the pardon as a consideration favoring reinstatement. We express no view at this time concerning the proper weight to be given the pardon in determining whether petitioner has proven his fitness for reinstatement.

D.C. Code § 11-2503(a) provides that, "[i]f a final judgment of conviction [of an offense involving moral turpitude] is certified to the court, the name of the member of the bar so convicted shall be struck from the roll of the members of the bar and such person shall thereafter cease to be a member." We have recognized repeatedly that, "in accordance with the plain language of section 11-2503(a)," disbarment is mandatory once the "final judgment" condition is met. *In re Hopmayer*, 625 A.2d 290, 292 (D.C. 1993); *see also, e.g.*, *In re McBride*, 602 A.2d 626, 629 (D.C. 1992) (en banc).[2] By contrast, the same section states that, "[u]pon the granting of a pardon to a member so convicted, the court may vacate or modify the order

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a pardon to a member so convicted, the court may vacate or modify the order of disbarment.

[2] In *McBride*, on the other hand, we recognized that the statutory language (specifically the word "thereafter") was ambiguous with respect to the length of disbarment, 602 A.2d at 637-38, and applying by analogy the rule of lenity in criminal cases, we interpreted that ambiguity to mean that an attorney disbarred under the statute, "like all others who have been disbarred, [is] entitled to petition for reinstatement * * * after five years of disbarment." *Id.* at 641.

of disbarment" (emphasis added). The legislature's use of the permissive "may," on its face, would seem to defeat petitioner's argument that the court has no discretion but to reinstate an attorney disbarred under the statute but subsequently pardoned. In *McBride* this court described the legislative history of § 11-2503, including a comprehensive amendment of the statute in 1920 that gave the court "power," upon the granting of a pardon, "to vacate or modify [a prior] order of disbarment or suspension." 602 A.2d at 638. The court, in passing, pointed out that in proposing adoption of that amendment the House Committee on the Judiciary "explained that a pardon would not automatically reverse any disbarment; rather, the decision to reinstate after a pardon remained with the court." *Id.* at 639 n.23 (citing *To Amend the Code of the District of Columbia: Hearings on H.R. 14974 Before the House Comm. on the Judiciary*, 64th Cong., 1st Sess. 63 (1916)).

Despite this authority plainly indicating that a pardon does not have the automatic effect petitioner would give it, he argues that in *In re Abrams*, 689 A.2d 6 (D.C. 1997) (en banc), the court implicitly recognized that when disbarment rests solely upon proof of conviction, as it does under § 11-2503(a), a subsequently granted pardon strips the disbarment of its continued legitimacy. *Abrams* does not stand for that conclusion; indeed, the *Abrams* court was not asked to decide the effect of a pardon upon a disbarment based on § 11-2503(a). Abrams had pled guilty to two counts of willful failure to answer questions pertinent to a Congressional inquiry, a crime Bar Counsel did not contend involved moral turpitude. *See id.* at 11. After Abrams was pardoned by the President, the Board on Professional Responsibility recommended his suspension for one year on the ground that the underlying conduct involved dishonesty, deceit, or misrepresentation in violation of a disciplinary rule. *Id.* at 6. In accepting that finding of misconduct (but imposing the lesser sanction of public censure), the court rejected the argument that the "court's

authority to impose professional discipline was * * * nullified by the presidential pardon." *Id.* at 7.[3]

Petitioner is correct that, although rejecting Abrams' claim regarding the effect of a pardon, the court opined that "[t]he presidential pardon would undoubtedly have precluded a sanction based on Abrams' conviction, and Abrams did not, in any event, commit such a crime [*i.e.*, one involving moral turpitude]." *Id.* at 11 (emphasis added). But as the discipline imposed in *Abrams* did not stem from the application of § 11-2503(a), the court did not have to come to grips with the Congressional judgment expressed in that statute that "'the decision to reinstate after a pardon remain[s] with the court,'" as a matter of discretion. *McBride*, 602 A.2d at 639 n.23 (quoting Congressional report). Moreover, the quoted language from *Abrams* was stated in the context of a pardon that had been issued before attorney discipline was imposed, *see Abrams*, 689 A.2d at 9, a situation different from the present case and one that § 11-2503(a) by its terms appears not to address. Consequently, the statements in *Abrams* on which petitioner relies provide no basis for disregarding the plain language of the statute.

Based upon that language, we reject petitioner's argument that the pardon requires his automatic reinstatement without

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[3] The court reasoned in part:

> "No moral character qualification for Bar membership is more important than truthfulness and candor." *In re Meyerson,* 190 Md. 671, 59 A.2d 489, 496 (1948). An attorney is required to be a person of good moral character not only at the time of admission to the Bar, but also thereafter. *In re Rouss*, 221 N.Y. 81, 116 N.E. 782, 783 (1917) (Cardozo, C.J.). The pardon could not "reinvest [Abrams] with those qualities which are absolutely essential for an attorney at law to possess or rehabilitate him in the trust and confidence of the court." *In re Lavine*, 2 Cal. 2d 324, 41 P.2d 161, 163 (1935) (citation omitted).

689 A.2d at 7.

regard to whether he has established fitness to resume practice in accordance with D.C. Bar Rule XI, § 16(d) and the factors set forth in *In re Roundtree*, 503 A.2d 1215 (D.C. 1985). *See In re Lavine*, 2 Cal. 2d 324, 41 P.2d 161, *modified*, 2 Cal. 2d 324, 42 P.2d 311 (1935). Petitioner must file the appropriate application for reinstatement with the Board, and in that proceeding he "may urge the pardon as a consideration for reinstatement." *Grossgold v. Supreme Court of Illinois*, 557 F.2d 122, 126 (7th Cir. 1977).

Petition denied.

STEADMAN, Associate Judge, concurring:

I continue to adhere to the view of the dissent in *In re Abrams* as to the continued force of Supreme Court precedent, which only that Court can overturn, on the effect of a presidential pardon. However, bound as I now am by the contrary view of the majority in *Abrams*, I concur in the exposition of the court's opinion as to the appropriate next step in this reinstatement proceeding.

APPENDIX C

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. M-122-82

IN THE MATTER OF WILLIAM A. BORDERS, JR.,

A Member of the Bar of the District of Columbia Court of Appeals.

August 31, 1983

Before **NEBEKER** and **BELSON**, Associate Judges, and **REILLY**, Associate Judge, Retired.

ORDER

PER CURIAM:

On consideration of the certificate filed herein consisting of the record in Criminal No. 81-596-CR-ETC, *United States v. Borders and Hastings*, indicating that respondent, William A. Borders, Jr., was convicted in the United States District Court for the Southern District of Florida of conspiracy, obstruction of justice, aiding and abetting, and violation of the Travel Act, 18 U.S.C. §§ 371, 1503, 2, and 1952, and of the report and recommendation of the Board on Professional Responsibility, which is annexed hereto and incorporated herewith, and it appearing therefrom that at least two of the crimes of which the respondent has been convicted involved moral turpitude, and that these convictions have been affirmed on appeal, 693 F.2d 1318 (11th Cir.), *cert. denied*, 103 S. Ct. 1875 (1983), it is

ORDERED that the respondent, **WILLIAM A. BORDERS, JR.,** is disbarred from the practice of law in the District of Columbia pursuant to D.C. Code § 11-2503(a) (1981), effective September 30, 1983.

The Clerk shall cause to be transmitted to the respondent a copy of this order thereby causing him to have notice of disbarment; and a copy of Section 19 of Rule XI of the Rules Governing the Bar of the District of Columbia.

Supreme Court, U.S.
FILED
SEP 15 2003
OFFICE OF THE CLERK

No. 03-246

IN THE

Supreme Court of the United States

WILLIAM A. BORDERS, JR.,

Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF BAR COUNSEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF IN OPPOSITION

JOYCE E. PETERS*
Bar Counsel
JUDITH HETHERTON
Assistant Bar Counsel
DISTRICT OF COLUMBIA
OFFICE OF BAR COUNSEL
515-5th Street, N.W., Room 127
Washington, D.C. 20001
(202) 638-1501

* *Counsel of Record* — *Counsel for Respondent*

183027

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether, upon the grant of a presidential pardon to an attorney previously disbarred by the District of Columbia Court of Appeals on the basis of a determination that his criminal convictions involved moral turpitude, that licensing court is precluded from implementing its procedures for determining whether the attorney is fit to resume the practice of law and instead must reinstate the attorney automatically.

2. Whether the congressionally enacted statute committing to the discretion of the District of Columbia Court of Appeals the determination whether to reinstate to the practice of law an attorney pardoned for offenses that resulted in his disbarment is an unconstitutional infringement of the President's pardon power.

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INTRODUCTION AND SUMMARY

The decision of the District of Columbia's highest court that is challenged here presents no issue warranting the grant of *certiorari*. The court below declined to grant automatic reinstatement to the practice of law to an attorney who received a presidential pardon years after he had been disbarred for convictions that had been determined in the original disciplinary proceeding to inherently involve moral turpitude, and after the attorney had failed in reinstatement proceedings to establish to the satisfaction of the court that he was fit to resume the practice of law. Instead, the court below ruled that the effect, if any, of the pardon may be considered in another reinstatement proceeding to determine whether Petitioner is now fit to resume the practice of law. This decision was well within the authority of the court below, as indicated by numerous decisions of this Court recognizing the authority of courts of the states and the District of Columbia to regulate the legal profession to ensure the competency and moral fitness of its members. Further, in its ruling the court below properly relied on a congressionally enacted statute, D.C. Code § 11-2503(a), which specifically grants the court discretion to determine whether to vacate an order of disbarment premised on convictions for crimes of moral turpitude when those crimes are subsequently pardoned.

The decision of the court below and the statute on which it relied are not at odds with this Court's decisions interpreting the Pardon Clause. Disbarment pursuant to D.C. Code § 11-2503(a) is neither punishment for the offense nor a disability imposed on account of a conviction. Rather, it is the consequence of a determination that the offense involved moral turpitude, and thus the attorney can no longer be

deemed to possess the moral prerequisites for the practice of law. A presidential pardon for such a crime, which is an act of grace, may be granted for any reason or no reason at all. A pardon is not, however, a determination that the attorney is morally fit or competent to resume the practice of law. Recognizing this principle, the federal and state courts that have considered the issue have stated that the proper course to follow when an attorney is pardoned for a conviction on which his disbarment was premised is precisely what the court below decided – to consider the effect, if any, of the pardon in a reinstatement proceeding. *E.g., Grossgold v. Supreme Court of Illinois*, 557 F.2d 122 (7th Cir. 1977); *In re Kaufman*, 245 N.Y. 423, 157 N.E. 730 (1927) (Cardozo, C.J.); *In re Lavine*, 2 Cal.2d 324, 41 P.2d 161, *modified*, 42 P.2d 311 (1935). There is no conflict between the decision of the court below and the other federal and state cases dealing with the issue. For all these reasons, *certiorari* should be denied.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article II, section 2, clause 1 of the United States Constitution states in relevant part:

> The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

D.C. Code § 11-2503(a) states:

> When a member of the bar of the District of Columbia Court of Appeals is convicted of an offense involving moral turpitude, and a certified

> copy of the conviction is presented to the court, the court shall, pending final determination of an appeal from the conviction, suspend the member of the bar from practice. Upon reversal of the conviction the court may vacate or modify the suspension. If a final judgment of conviction is certified to the court, the name of the member of the bar so convicted shall be struck from the roll of the members of the bar and such person shall thereafter cease to be a member. Upon the granting of a pardon to a member so convicted, the court may vacate or modify the order of disbarment.

STATEMENT OF PROCEEDINGS BELOW

Petitioner, William A. Borders, Jr., was convicted in federal court in March 1982 of conspiracy to bribe a United States district judge (18 U.S.C. § 371), obstruction of justice (18 U.S.C. §§ 2, 1503), and two counts of traveling in interstate commerce with intent to commit bribery (18 U.S.C. § 1952). *See United States v. Borders*, 693 F.2d 1318 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983). The judge involved was then federal district judge Alcee L. Hastings, a longtime friend of Petitioner. The evidence showed that Petitioner conducted an elaborate and sophisticated scheme to induce $150,000 in bribes from two criminal defendants who had been convicted of racketeering in a jury trial before Judge Hastings. *Id.* at 1319-24. The bribe money was to be shared with the judge, who was considering not only their criminal sentencings but also a related forfeiture of $1.2 million worth of property. Petitioner received a $25,000 down payment on the bribe from an undercover agent. The remainder was to be paid after the forfeiture was set aside. *Id.* at 1321. The judge then issued an order setting

aside the forfeiture in part, returning $845,000 to the defendants. *Id.* at 1322. Petitioner was arrested three days later, after receiving the remaining $125,000. *Id.* at 1323. In May 1982, Petitioner was sentenced to four concurrent five-year terms of imprisonment and fined $35,000. *Id.* at 1319.

Following his conviction and sentencing, on June 7, 1982, the court below suspended Petitioner from the practice of law in the District of Columbia and referred the matter to the court's Board on Professional Responsibility ("Board") for a recommendation whether the crimes of which Petitioner had been convicted involved moral turpitude within the meaning of D.C. Code § 11-2503(a).[1] *In re William A. Borders, Jr.*, No. 1982-81, at 1 (D.C. Board on Professional Responsibility, Nov. 2, 1982) (reprinted in the Appendix ("App."), *infra*).

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1. The court below has held that a crime involves moral turpitude if "the act denounced by the statute offends the generally accepted moral code of mankind"; if it involves "baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man"; or if the act is "contrary to justice, honesty, modesty, or good morals." *In re Colson*, 412 A.2d 1160, 1168 (D.C. 1979) (*en banc*) (holding that obstruction of justice involves moral turpitude *per se*). Where the offense does not involve moral turpitude inherently or *per se*, that is, based on an examination of the elements of the offense, a hearing is held to determine whether the offense involves moral turpitude on its facts. *Id.* at 1164-65. If it is unclear whether the crime involves moral turpitude *per se*, the court below has instructed that a hearing should be held and evidence admitted "that goes to the moral implications of the particular [attorney's] acts, as a way of determining whether his particular offense involved moral turpitude, even if the crime cannot be said *per se* to do so." *Id.* at 1165 n.10.

Petitioner was notified of the institution of formal disciplinary proceedings against him under the court's order but did not enter an appearance before the Board and filed no brief or other submission. *Id.* at 1-2 (App. at 2a). On November 2, 1982, the Board, relying on the prior decision of the court below in *In re Colson*, *supra* note 1, stated its view that at least two of the crimes of which Petitioner had been convicted – conspiracy to bribe a federal judge and obstruction of justice – "necessarily involve moral turpitude *per se* and it is therefore unnecessary for the Board to refer this case to a Hearing Committee at this time to take testimony as to factual details of these crimes of [Petitioner]." *Id.* at 2 (App. at 2a). The Board recommended that Petitioner be disbarred once his conviction of either crime became final. *Id.* at 4 (App. at 4a).

On December 10, 1982, Petitioner's convictions were affirmed on appeal, *United States v. Borders, supra*, and on April 25, 1983, this Court denied *certiorari*, 461 U.S. 905. Thereafter, on August 31, 1983, the court below ordered Petitioner disbarred pursuant to D.C. Code § 11-2503(a) concluding, based on the record of conviction and the report and recommendation of the Board (which it appended to and incorporated in its decision), that at least two of the crimes of which Petitioner had been convicted inherently involved moral turpitude. *In re William A. Borders, Jr.*, No. M-122-82 (D.C. App. Aug. 31, 1983) ("*Borders I*") (Petitioner's Appendix ("Pet. App.") at 10a-11a).

During the seven years immediately following his convictions and sentencing, Petitioner, who had not testified at his criminal trial, refused to testify on four occasions before official bodies concerning the circumstances of the offenses:

(1) before a grand jury investigating Judge Hastings[2]; (2) in connection with an investigation of Judge Hastings' conduct by a judicial body; (3) before the House Subcommittee on Criminal Justice; and (4) at Judge Hastings' impeachment trial in the United States Senate.[3] *See In re Borders*, 665 A.2d 1381, 1383 (D.C. 1995) ("*Borders II*"). Petitioner's refusals to testify before the grand jury and at Judge Hastings' impeachment trial in the Senate, despite grants of use immunity, resulted in two separate findings against him of civil contempt and led to additional periods of incarceration. *Id.*

In August 1993, following a decision by the court below that henceforth any attorney who was disbarred could seek reinstatement after five years, *In re McBride*, 602 A.2d 626 (D.C. 1992) (*en banc*), Petitioner applied for reinstatement. A Hearing Committee considered extensive testimony from Petitioner and his character witnesses, as well as from government investigators. The transcript of Petitioner's criminal trial and documentation concerning his subsequent refusals to testify were received in evidence. Petitioner did not take issue with the correctness of the jury verdict or the gravity of his conduct, acknowledging that it had been

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2. Judge Hastings was tried separately and acquitted by a jury in February 1983. *United States v. Hastings*, Crim. No. 81-596-CR-ETG (S.D. Fla.). As the Eleventh Circuit noted, however, the jury that convicted Petitioner of conspiracy necessarily found that the government had proven the involvement of Judge Hastings, the only other conspirator named in the indictment. *United States v. Borders, supra*, 693 F.2d at 1324.

3. The impeachment proceedings resulted in Judge Hastings' removal from the federal bench. He was subsequently elected to the U.S. House of Representatives, where he now serves.

"corrupt." *Borders II*, 665 A.2d at 1383. He continued his refusal to answer questions about the events that led to his convictions, however, maintaining that his criminal conduct was "unexplainable." *Id.* With respect to his refusals to cooperate throughout the proceedings against Judge Hastings, Petitioner stated:

> There is a time when no justice is served by trying to bring evil on another person. The man who holds his tongue in these situations must be willing to pay the price for his silence. If he believes that his silence serves a higher good, he must be willing to pay for that higher good.

Id. at 1384. Both the Hearing Committee and the Board recommended that the court below deny the petition for reinstatement. *Id.*

On October 26, 1995, the court below rejected Petitioner's first petition for reinstatement. *Id.* Applying its standards for reinstatement as enunciated in *In re Roundtree*, 503 A.2d 1215 (D.C. 1985), the court concluded that Petitioner had failed to establish by clear and convincing evidence his fitness to practice law, particularly with respect to his "conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones," and his "present character." *Borders II*, 665 A.2d at 1382-85. This determination stemmed from "the record of petitioner's complete refusal to testify about the events underlying his convictions in the years since the imposition of discipline." *Id.* at 1383. The court also noted that Petitioner seemed to view himself as a "victim" in the matter rather than the "causative actor." *Id.* at 1384. Agreeing with the Hearing Committee and the Board, the court found Petitioner's "'commitment to silence about the events [to

be] longstanding and deeply felt,' but one contrary to his ethical obligations as an attorney." *Id.* (brackets in original). The court noted that under the relevant disciplinary rules, Petitioner was obligated to report misconduct of other attorneys and judges.[4] Further, his "refusal to answer questions when subpoenaed to testify under grants of immunity was incompatible with these obligations and reflects unfavorably upon his rehabilitation." *Id.* The court concluded that, should Petitioner "again face a similar decision, 'there is no indication in [p]etitioner's evidence that he would follow a different course today.'" *Id.* (brackets in original). The court summarized the obstacle to Petitioner's reinstatement as follows:

> Petitioner's motivation remains unexplained. As the Hearing Committee stated, "Without an understanding of how or why Petitioner engaged in conduct so out of keeping with the William Borders everyone knew and respected in 1981, it is very difficult for the Bar to have confidence that he will not do the same thing again."

Id. at 1385.

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4. Former Disciplinary Rule 1-103(A), Disclosure of Information to Authorities, in effect at the time of Petitioner's refusals to testify following his convictions, provided that "[a] lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges." District of Columbia Rule of Professional Conduct 8.3(b), in effect since 1991, provides that "[a] lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."

Petitioner's second petition for reinstatement was dismissed by the Board on July 14, 1999, on the grounds that the application failed on its face to demonstrate Petitioner's entitlement to a hearing. Petitioner filed a brief with the court below excepting to the dismissal, but withdrew his exception in February 2000. Instead, he pursued a pardon, which was granted by President William J. Clinton on January 20, 2001.

On December 21, 2001, Petitioner moved the court below to vacate the order of his disbarment and reinstate him to the practice of law, arguing that the pardon had "nullified" and "invalidated" his conviction, thus rendering the sanction of disbarment "null and void." A three-judge panel of the court "reject[ed] petitioner's argument that the pardon requires his automatic reinstatement without regard to whether he has established fitness to resume practice in accordance with D.C. Bar Rule XI, § 16(d) and the factors set forth in *In re Roundtree*, 503 A.2d 1215 (D.C. 1985)." *In re Borders*, 797 A.2d 716, 718 (D.C. 2002) (*"Borders III"*). The court relied on the language and legislative history of D.C. Code § 11-2503(a), concluding that "[t]he legislature's use of the permissive 'may' on its face, would seem to defeat petitioner's argument that the court has no discretion but to reinstate an attorney disbarred under the statute but subsequently pardoned." *Id.* at 717 (Pet. App. at 7a). The court denied the petition "without prejudice to the filing of a proper petition for reinstatement before the Board, in which petitioner may urge the pardon as a consideration favoring reinstatement." *Id.* (Pet. App. at 6a). Petitioner sought rehearing *en banc*, which was denied on April 16, 2003 (Pet. App. at 1a-4a).[5] This petition followed.

5. Three judges dissented from the denial of rehearing *en banc*, stating that the Court should consider Petitioner's legal challenge without requiring him to petition for reinstatement.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COURT BELOW IS WELL WITHIN THE AUTHORITY CONFERRED ON IT BY CONGRESS TO REGULATE THE LEGAL PROFESSION IN THE DISTRICT OF COLUMBIA

This Court previously has had occasion to note that each State

> has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. . . . The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice.

Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 434 (1982); *accord*, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 (1983); *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 460 (1978); *Goldfarb v. Virginia Bar*, 421 U.S. 773, 792 (1975). The Court has emphasized that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb*, 421 U.S. at 792; *accord*, *Ohralik*, 436 U.S. at 460.

The court below has been vested by Congress with the responsibility for regulating the legal profession in the District of Columbia, and empowered to "make such rules

as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." D.C. Code § 11-2501(a); *see also* D.C. Code § 11-2502. Pursuant to that authority, the court has promulgated a rule conditioning admission to the bar of the court on the applicant's demonstration, by clear and convincing evidence, of "good moral character and general fitness to practice law." D.C. App. R. 46(d), (e). The court below has also promulgated rules of professional conduct (*see* Rule X of the Rules of the District of Columbia Court of Appeals Governing the Bar ("D.C. Bar R.")), and rules governing the conduct of disciplinary proceedings (D.C. Bar R. XI), including reinstatement of disbarred and suspended attorneys (*id.*, § 16).

The court below has been directed by Congress to disbar summarily attorneys who have been convicted of criminal offenses involving moral turpitude. D.C. Code § 11-2503(a). In enacting the original legislation granting this authority, the legislators stated that the purpose of the provision for summary disbarment upon proof of conviction of an offense involving moral turpitude was "to make the record of the conviction work automatically," *To Amend the Code of the District of Columbia*, Hearings on H.R. 14974 Before the House Comm. on the Judiciary, 64th Cong., 1st Sess. 63 (1916), and thus "avoid the necessity of retrial of a matter [in a disbarment proceeding] in case of conviction by a petit jury . . . ," *id.* at 64. The court below has interpreted this authority as mandating disbarment upon proof of conviction and a determination that the elements of the offense at issue "inherently" or "manifestly involve moral turpitude by virtue of their underlying elements. . . ." *In re Colson*, *supra* note 1, 412 A.2d at 1164. On the other hand, where moral

turpitude is not evident from an examination of the elements of the offense alone, "a full hearing becomes necessary" to determine whether the offense is one involving moral turpitude, thus requiring disbarment under the statute. *Id.* at 1165.

The same D.C. Code section that requires the court below to disbar an attorney convicted of an offense found to involve moral turpitude also provides that upon the grant of a pardon to an attorney so convicted, "the court *may* vacate or modify the order of disbarment." D.C. Code § 11-2503(a) (emphasis added). The legislative history of the statute makes clear that the legislators intended to provide the court with discretion in this matter. The current version of this portion of the statute is essentially the same as the 1920 version. *See In re McBride, supra,* 602 A.2d at 638-40. In proposing the language that was ultimately adopted in 1920, the U.S. House of Representatives Committee on the Judiciary "explained that a pardon would not automatically reverse any disbarment; rather, *the decision to reinstate after a pardon remained with the court.*" *Id.* at 638 n.23 (citing *To Amend the Code of the District of Columbia, supra,* at 65 (emphasis added)); *see also Borders III,* 797 A.2d at 717 (Pet. App. at 7a).

Under the rules of the court below, once disbarred, an attorney seeking reinstatement has the burden of establishing by clear and convincing evidence both "[t]hat the attorney has the moral qualifications, competency, and learning in law required for readmission," and "[t]hat the resumption of the practice of law by the attorney will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest." D.C. Bar R. XI, § 16(d).

Two of Petitioner's offenses – conspiracy to bribe a federal judge and obstruction of justice – were determined by the court below in 1983 to involve moral turpitude *per se*, requiring his disbarment under D.C. Code § 11-2503(a). *Borders I, supra* (Pet. App. at 10a). Further, in 1995, following an examination of both the conduct that resulted in his convictions and his post-conviction conduct, the court below denied Petitioner reinstatement due to his failure to satisfy the court's standards for readmission by clear and convincing evidence. *Borders II, supra* (Pet. App. at 5a-9a). The decision of the court below to reject Petitioner's motion for automatic reinstatement to the bar based on his pardon in 2001, without regard to his satisfaction of these standards, was well within the authority conferred on the court by Congress to regulate the legal profession in the District of Columbia and the specific grant of discretion in D.C. Code § 11-2503(a) to deny reinstatement to an attorney who receives a pardon for crimes of moral turpitude that led to his disbarment.

II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT INTERPRETING THE PARDON CLAUSE, OR WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS OR STATE COURTS OF LAST RESORT

Apparently recognizing that the decision of the court below was well within the authority conferred on it by Congress, Petitioner argues that "[t]o the extent that D.C. Code § 11-2503(a) suggests that reinstatement is permissive, rather than mandatory, in these circumstances, it is inconsistent with the President's pardon power, and therefore must yield." Petition at 12. Petitioner's argument

hinges on his contention that, because he was disbarred based on the record of his convictions, not, in his view, on the underlying conduct, his disbarment was punishment for, or a disability resulting from his convictions.

This Court has stated that "the granting of a pardon is . . . 'an executive action that mitigates or sets aside *punishment* for a crime.'" *Nixon v. United States*, 506 U.S. 224, 232 (1993) (emphasis in original). The imposition of professional discipline does not constitute punishment, whether as a matter of constitutional law or a component of attorney ethics. In *Ex parte Wall*, 107 U.S. 265, 288 (1882), the Court explained that an attorney disciplinary proceeding following conviction of a crime "is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practise in them." The court below has repeatedly made clear that its disciplinary sanctions are designed not to punish attorneys, but rather "to maintain the integrity of the profession, to protect the public and the courts, and to deter other attorneys from engaging in similar misconduct." *E.g., In re Abrams*, 689 A.2d 6, 12 (D.C.) (*en banc*), *cert. denied*, 521 U.S. 1121 (1997); *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (*en banc*).

It is true that Petitioner was disbarred under D.C. Code § 11-2503(a) based on the record of his convictions, rather than following a full evidentiary hearing on the details of the criminal conduct. Petitioner was disbarred, however, based on a finding that his convictions necessarily involved moral turpitude. Both the Board and the court below determined in the original disciplinary proceeding that, given the court's prior decision in *In re Colson, supra* note 1, that obstruction of justice is a crime involving moral turpitude

per se, and given the elements of the offense of conspiracy to bribe a federal judge, there was no possibility that the offenses did not involve moral turpitude, and thus it was "unnecessary . . . to refer this case to a Hearing Committee at this time to take testimony as to factual details of these crimes of [Petitioner]." *In re William A. Borders, Jr.*, No. 1982-81, *supra* (Board report) (App. at 2a); *see Borders I* (Pet App. at 10a) (incorporating Board report). While the disciplinary proceeding was summary, as envisioned by Congress when it enacted D.C. Code § 11-2503(a), "to make the record of the conviction work automatically," and thus "avoid the necessity of retrial of a matter [in a disbarment proceeding] in case of conviction by a petit jury . . . ," *To Amend the Code of the District of Columbia*, *supra*, at 63, 64, it was nevertheless a disciplinary proceeding, not a criminal sentencing, and there was a finding that Petitioner's criminal convictions necessarily involved moral turpitude.[6]

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6. Petitioner's situation is thus distinguishable from that of the attorney in *Ex parte Crisler*, 159 Miss. 247, 132 So. 103 (1931), on which Petitioner relies. There, the order of disbarment was entered as a part of the criminal sentence rather than in a separate disciplinary proceeding. The court deemed it to be part of the punishment imposed for the crime, and held that the subsequent grant of a gubernatorial pardon required that the disbarment order be annulled.

There is a certain irony in Petitioner's position. In Petitioner's view, an attorney such as himself, disbarred summarily based on the record of conviction because an examination of the elements of the offense demonstrates that it necessarily involves moral turpitude, is entitled to automatic reinstatement to the practice of law upon receipt of a pardon. On the other hand, an attorney who commits an offense the moral turpitude of which is not evident from its elements, and who is disbarred only after an exploration of the circumstances of the offense at a hearing demonstrates moral turpitude, would not be entitled to automatic reinstatement upon receipt of a pardon.

In pressing his claim that the decision of the court below infringes the President's pardon power, Petitioner relies principally on *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). He urges that *Garland* "stands not only for the general proposition that the President's pardon power nullifies any disabilities that attach as a result of the pardoned conviction, but also for the specific proposition that deprivation of the ability to practice law constitutes a 'disability' or 'punishment' that can be nullified by a pardon." Petition at 8. Petitioner misreads *Garland*. In *Garland* the Court held that insofar as an 1865 Act of Congress required attorneys, in order to maintain membership in the bar of the federal courts, to take an oath that they had neither aided the Confederacy during the Civil War nor held office in the Confederate government, it was unconstitutional both as a bill of attainder and an *ex post facto* law. It excluded attorneys from their profession based on past conduct and thus was a form of punishment for past conduct. 71 U.S. (4 Wall.) at 377. In so ruling, this Court criticized the statute in question as an attempt by Congress to regulate the conduct of attorneys who

> are not officers of the United States. . . . They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. . . . , and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. *Their admission or their exclusion . . . . is the*

> *exercise of judicial power*, and has been so held in numerous cases.

Id. at 378-79 (emphasis added).

The expansive language in *Garland* on which Petitioner relies, concerning the "blotting out" of guilt by a presidential pardon,[7] was *dictum* which the Court viewed as "strengthening" its holding that the legislation at issue was unconstitutional as a bill of attainder and an *ex post facto* law. *Id.* at 380. This language has almost universally been interpreted by the lower courts as *dictum* and inconsistent with both earlier and later decisions of this Court interpreting the Pardon Clause. *E.g.*, *In re North (George Fee Application)*, 314 U.S. App. D.C. 102, 105, 62 F.3d 1434, 1437 (1994) (Div'n for the Purpose of Appointing Independent Counsels); *United States v. Noonan*, 906 F.2d 952, 958 (3d Cir. 1990); *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975); *In re Abrams*, *supra*, 689 A.2d

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7. The passage at issue is as follows:

> A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

71 U.S. (4 Wall.) at 380-81.

at 16-19; *In re Lavine*, 2 Cal.2d 324, 331-32, 41 P.2d 161, 164, *modified*, 42 P.2d 311 (1935). Indeed, given the *Garland* Court's earlier emphasis on the authority of the courts to regulate the legal profession, the *dictum* can hardly be read as mandating reinstatement to the bar of the court of an attorney disbarred for a conviction involving moral turpitude who later receives a presidential pardon. Moreover, given *Garland's* emphasis on the authority of the courts to regulate the legal profession, the decision of the court below is entirely consistent with *Garland*.

Nor is the decision of the court below inconsistent with any of the other decisions of the Court interpreting the Pardon Clause. *E.g., Knote v. United States*, 95 U.S. 149, 153-154 (1877) ("[A pardon] does not make amends for the past. . . . The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required."); *Carlesi v. New York*, 233 U.S. 51 (1914) (use of a pardoned conviction for sentence enhancement does not constitute punishment for the earlier offense in derogation of the President's pardon authority); *Burdick v. United States*, 236 U.S. 79, 91 (1915) (a pardon implies guilt of the offense for which it is granted). In a leading scholarly analysis of this Court's Pardon Clause cases, Professor Samuel Williston concluded:

> The true line of distinction seems to be this: The pardon removes all *legal punishment* for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime

> without conviction, the pardon removes such disqualifications. *On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.*

Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv. L. Rev. 647, 653 (1915) (emphases added). Here, Petitioner's disbarment was not legal punishment, character is unquestionably a necessary qualification for membership in the bar, Petitioner's crimes would have disqualified him from the practice of law even if he had not been prosecuted criminally, and the fact that he has been convicted and pardoned does not make him any more eligible for membership in the bar.

Professor Williston's view of the Court's cases on the Pardon Clause is shared almost universally by the lower courts, whose decisions are consistent with that of the court below. Where, as here, an order of disbarment has been entered *before* the conviction is pardoned, the lower courts have stated that the pardon does not erase the fact of the attorney's conviction and the moral turpitude inherent in the very elements of the offense, and thus the proper course is to consider the effect of the pardon in reinstatement proceedings. *Borders III*, 797 A.2d at 718 (Pet. App. at 8a-9a)[8]; *accord*, *Grossgold v. Supreme Court of Illinois*, 557

8. Petitioner's claim that the court below failed to follow its own prior holding in *In re Abrams, supra,* is incorrect. Petitioner cites language in *Abrams* suggesting that if Bar Counsel had sought to disbar Abrams summarily under D.C. Code § 11-2503(a) based

(Cont'd)

F.2d 122, 125 (7th Cir. 1977) (upon grant of presidential pardon, attorney disbarred on account of conviction of crime involving moral turpitude not entitled to automatic reinstatement but may urge pardon as a consideration for reinstatement)[9]; *In re Lavine, supra* (same; gubernatorial

(Cont'd)
on his conviction of a crime of moral turpitude, rather than for violations of the disciplinary rules based on the underlying conduct, such a course would have been "precluded" because Abrams was pardoned before any disciplinary sanction was imposed. As the court below noted, its holding is not inconsistent with this *dictum* in *Abrams* because Petitioner was not pardoned until long *after* his summary disbarment pursuant to D.C. Code § 11-2503(a). *Borders III*, 797 A.2d at 717-18 (Pet. App. at 7a-8a).

For the same reason, Petitioner's reliance on *Scott v. State*, 6 Tex.Civ.App. 343, 25 S.W. 337 (Tex. Civ. App. 1894), and *In re Emmons*, 154 P. 619, 621 (Cal. Ct. App. 1915), is misplaced. These cases concern the disbarment of an attorney based solely on the record of a conviction *after* the conviction has been the subject of a pardon. In these circumstances, a disciplinary proceeding may be instituted based on the underlying conduct, but not on the basis of the record of the conviction alone. *See* Office of Legal Counsel, U.S. Department of Justice, *Memorandum for the Pardon Attorney*, June 19, 1995 (*available at* www.usdoj.gov/olc/pardon3.19.htm). As this and other Departmental opinions make clear, a presidential pardon does not foreclose the imposition of professional discipline. *E.g.*, *Op. Att'y Gen. No. 78-84*, 2 Op. Off. Legal Counsel 370 (1977) ("while a pardon relieves the offender of all disabilities imposed by way of punishment, it does not relieve an offender of disabilities that attend a conviction").

9. Grossgold had been suspended from the practice of law some five years after his conviction on nine counts of mail fraud. Less than a month later he received a presidential pardon. The Seventh Circuit found it lacked subject matter jurisdiction to consider the (Cont'd)

pardon for crime of moral turpitude); *In re Kaufman*, 245 N.Y. 423, 430-31, 157 N.E. 730, 733 (1927) (same; presidential pardon for felony conviction). This point was stated eloquently by Chief Judge (later Justice) Cardozo in a case in which a presidential pardon had been granted four years after a summary disbarment based on a felony conviction:

> [R]einstatement will not follow automatically from pardon without more. . . . There must be convincing proof of innocence before pardon will restore to the fellowship of the bar. Even innocence of crime will not suffice if there has been a failure to live up to the standards of morality and honor. Pardon does no more than open the door to an inquiry that would otherwise be barred.[10] . . . [T]he power to pardon is bestowed on the Executive. For this, the statute says that upon pardon or reversal, the power to reinstate shall be vested in the courts.[11]

(Cont'd)

matter. Nevertheless, assuming *arguendo* that it had jurisdiction, the court went on to declare that "the presidential pardon did not wipe out the moral turpitude inherent in the factual predicate supporting plaintiff's mail fraud conviction," 557 F.2d at 125, and did "not relieve [the] attorney from discipline," *id.* at 126.

10. The *Kaufman* Court was speaking in the context of a disciplinary system in which disbarments are otherwise permanent.

11. The New York statute under which Kaufman was disbarred contained a provision virtually identical to that in D.C. Code § 11-2503(a), making reinstatement after a pardon discretionary with the court. *See* 245 N.Y. at 426, 157 N.E. at 731.

The federal and state authority on which Petitioner relies is all inapposite. See notes 6 and 8, *supra*.[12]

III. THE DECISION OF THE COURT BELOW DOES NOT HAVE FAR-REACHING IMPLICATIONS

Petitioner contends that the decision of the court "will have potentially enormous consequences" for the recipients of pardons because it "greatly limits the scope of the presidential pardon power," "allowing disabilities that depend solely on a federal conviction to remain in effect even when the conviction has been nullified" by a pardon. Petition at 15-16. To the contrary, as demonstrated above, the decision does not concern a disability or punishment imposed for a pardon. The decision is limited to the situation in which an attorney who has previously been disbarred for a conviction found to involve moral turpitude is subsequently granted a pardon. The holding that the pardon does not strip the court below of its authority in this circumstance to require that the attorney demonstrate his competence and moral fitness before being reinstated to the practice of law is consistent with

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12. Petitioner contends that the decision of the court below is in conflict with the Seventh Circuit's decision in *Bjerkan v. United States*, 529 F.2d 125 (7th Cir. 1975). To the contrary, the decision of the court below is consistent with the relevant Seventh Circuit authority, *Grossgold*, on which the court below relied. *Borders III*, 797 A.2d at 718 (Pet. App. at 9a); see note 9, *supra*. In *Bjerkan*, the Seventh Circuit held that the grant of a pardon to a prisoner mooted his appeal of the denial of his motion pursuant to 28 U.S.C. § 2255, because the pardon removed all collateral consequences of his conviction. The decision has no application to the situation of an attorney who is pardoned after his disbarment for a criminal conviction involving moral turpitude, the precise question presented in *Grossgold*.

Ex parte Garland and other decisions of this Court interpreting the President's power under the Pardon Clause, as well as with relevant authority in both the federal and state courts. Contrary to Petitioner's contention, no "recurring" question "of exceptional importance" is presented.[13]

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13. Petitioner acknowledges that even if this Court were to grant *certiorari* and reverse the ruling of the court below, a disciplinary proceeding could yet be brought against him for the underlying disciplinary rule violations. Petition at 16 n.11. Thus, Petitioner's success in this Court might result only in the reinstitution of disciplinary proceedings at which he could again be disbarred. In this regard, Petitioner has never testified that he did not commit the criminal offenses of which he was convicted, either at his 1982 trial or at the 1993 hearing on his first petition for reinstatement. Indeed, in seeking reinstatement, Petitioner "admitt[ed] that his conduct had been 'corrupt.'" *Borders II*, 665 A.2d at 1383. The complete record of Petitioner's trial, which was before the Hearing Committee, the Board, and the court below in connection with his first petition for reinstatement, clearly established myriad violations of the disciplinary rules in effect at the time of Petitioner's conduct. Petitioner has never contended that the conduct underlying his criminal convictions did not violate these rules. Further, Petitioner's post-conviction refusal to testify before the grand jury investigating Judge Hastings, while he was still a member of the Bar, albeit suspended, constitutes a separate proven, although as yet uncharged, violation of the disciplinary rules.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOYCE E. PETERS*
Bar Counsel
JUDITH HETHERTON
Assistant Bar Counsel
DISTRICT OF COLUMBIA
OFFICE OF BAR COUNSEL
515-5th Street, N.W., Room 127
Washington, D.C. 20001
(202) 638-1501

Counsel for Respondent

* *Counsel of Record*

APPENDIX

BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS

Bar Docket No. 1982-81

In the Matter of

WILLIAMS A. BORDERS, JR.

Number 050898

REPORT AND RECOMMENDATION

The Respondent attorney has been convicted in U.S. District Court for the Southern District of Florida [*sic*] of violating the following sections of the Federal Criminal Code: (1) 18 U.S.C. 371; (2) 18 U.S.C. 2 and 1503; and (3) 1952.[1]

The D.C. Court of Appeals, on June 7, 1982, ordered Respondent suspended from the practice of law in the District of Columbia and referred the matter to this Board for a recommendation as to whether or not in the Board's opinion the crimes of which Respondent has been convicted involve moral turpitude within the meaning of 11 D.C. Code 2503(a).[2]

---

1. A copy of each of these statutes is appended for the Court's convenience.

2. The Court's order of reference did not mention 18 U.S.C. 201(c), but as this statute was specifically tied in with the conspiracy statutes (Section 371) in the indictment the Board has also attached a copy of the statute to this Report for the Court's convenience.

The Board notified the Respondent of the institution of formal proceedings under the Court's Order, but Respondent has failed to appear or file with the Board any brief or other submission.

In the opinion of the Board two of the crimes of which Respondent stands convicted necessarily involve moral turpitude *per se* and it is therefore unnecessary for the Board to refer this case to a Hearing Committee at this time to take testimony as to factual details of these crimes of Respondent.[3]

The Board deems it unnecessary to reach the issues at this time as to whether a violation of 18 U.S.C. 2 and 18 U.S.C. 1952, taken together, necessarily involves moral turpitude.

18 U.S.C. 371 makes participation in a conspiracy to commit a substantive Federal crime or fraud against the United States a crime in itself; and 18 U.S.C. 2 provides that one who aids and abets in the commission of a Federal crime is guilty as though he were a principal. With this in mind we turn now to a brief summary of the substantive statutes under which Respondent was convicted with a statement of the reasons why we hold that each statutory crime necessarily involves moral turpitude.

---

3. *In re Colson*, D.C. App., 412 1160 (1979).

(1)
18 U.S.C. 371 (with 18 U.S.C. 201(c)
Conspiracy Involving Contemplated
Receipt of a Bribe by a Public Official

Section 201(c) makes it a crime for a public official to directly or indirectly solicit, receive or agree to receive anything of value for himself or any other person or entity in return for influencing his official duty or the commission of a fraud upon the United States. Respondent's conviction under § 371 for violation of § 201(c) necessarily means that he has been engaged in a conspiracy to have a public official solicit or receive a bribe. See *U.S. v. Brewster*, 165 U.S. App. D.C. 1, 506 F.2d 62 (1974). We are of the opinion that participation in the bribery or attempted bribery of a public official inherently involves moral turpitude. See *In re Willcher*, D.C. App., decided July 2, 1982.[4]

(2)
18 U.S.C. 2 and 18 U.S.C. 1503
Influencing or intimidating a
Witness, Juror or Officer in U.S. Courts

Respondent was convicted of violating these two statutes which together make it a crime to aid and abet in influencing or attempting to influence any witness, juror or officer in a United States court by intimidation, force or threats, or other corrupt means. We are of the opinion that this inherently involves obstruction of justice, and therefore moral turpitude. *In re Colson, supra.*

---

4. Cf. *Attorney Grievance Commission v. Brewster*, 374 A.2d 602 (Md. 1977).

- - - - - - - -

Respondent has appealed from his convictions to the U.S. Court of Appeals for the Eleventh Circuit, and the Board is advised that his appeal is still pending. The Board recommends that in the event Respondent's conviction becomes final under either (1) 18 U.S.C. 371 (with 18 U.S.C. 201(c), or (2) 18 U.S.C. 1503 he be disbarred from the practice of law in the District of Columbia pursuant to 11 D.C. Code 2503(a).

BOARD ON PROFESSIONAL RESPONSIBILITY

By: Edmund D. Campbell

All members of the Board concur in this Report.

Date: November 2, 1982

Supreme Court, U.S.
FILED
SEP 30 2003
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No. 03-246

IN THE
Supreme Court of the United States

WILLIAM A. BORDERS, JR.,

Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF BAR COUNSEL,

Respondent.

On Petition For Writ Of Certiorari To The District Of Columbia Court Of Appeals

REPLY TO BRIEF IN OPPOSITION

KENNETH W. STARR
KANNON K. SHANMUGAM
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

CHARLES J. OGLETREE, JR.
Counsel of Record
HARVARD LAW SCHOOL*
516 Hauser Hall
Cambridge, MA 02138
(617) 495-5097

* *affiliation given for associational purposes only*

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INTRODUCTION

Respondent's brief in opposition is remarkable as much for what it does *not* say as for what it does. As for what it does not say: respondent does not deny that this case squarely presents the constitutional question whether an attorney whose disbarment rests solely on the basis of a pardoned criminal conviction is entitled to reinstatement. Respondent, however, chooses entirely to ignore almost all of this Court's long line of cases addressing the scope of the President's pardon power. That is not surprising, for those cases unambiguously affirm that the President's pardon power extends to *any* disabilities that attach as a result of the pardoned conviction — including petitioner's disbarment here. Respondent's effort to distinguish this Court's seminal discussion of the pardon power in *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), as mere dictum is ultimately unavailing. Further, respondent downplays the opinion of the Office of Legal Counsel — the President's own attorneys — which expressly states that an individual in petitioner's circumstances should be entitled to reinstatement.

As for what the brief in opposition *does* say: respondent attempts to distract the Court by dwelling at length on (1) the nature of petitioner's underlying criminal conduct (for which petitioner has long since expressed remorse); (2) the broad power of States to protect the integrity of the legal profession (which petitioner does not question); (3) the existence of a statutory provision stating that reinstatement is discretionary, rather than mandatory (which merely begs the constitutional question); and (4) the supposed existence of a "finding" that petitioner's convictions necessarily involved moral turpitude (which is misleading at worst and irrelevant at best). When all the smoke is cleared away, however, respondent identifies no vehicle problems that preclude this Court's review. Because the decision below conflicts with decisions of this Court and a federal court of appeals on the scope of a fundamental enumerated power, *certiorari* should be granted.

REASON FOR GRANTING THE WRIT

THE D.C. COURT OF APPEALS ERRED BY HOLDING THAT A PRESIDENTIAL PARDON DOES NOT NULLIFY DISABILITIES IMPOSED SOLELY ON THE BASIS OF THE UNDERLYING CONVICTION.

A. Respondent contends that the decision below does not conflict with decisions of this Court and a federal court of appeals. *See* Opp. 13-22. That contention lacks merit.

1. As a preliminary matter, respondent does not challenge, or even refer to, many of this Court's cases on the scope of the President's pardon power, which make clear that the power reaches *any* disabilities that attach as a result of the pardoned conviction. *See, e.g.*, *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 543 (1870) (stating that a pardoned individual is "relieved from any penalty which he might have incurred"); *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 151 (1873) (noting that "[a]ll have agreed that the pardon not merely releases the offender from the punishment prescribed for the offence, but that it obliterates in legal contemplation the offence itself"); *Osborn v. United States*, 91 U.S. 474, 477 (1876) (reasoning that "[i]t is of the very essence of a pardon that it releases the offender from the consequences of his offence").[1]

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[1] Although respondent does cite two other cases in passing, *see* Opp. 18, it mischaracterizes both of them. As to *Knote v. United States*, 95 U.S. 149 (1877), respondent ignores *Knote*'s description of a pardon as "an act of grace" that "releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights." *Id.* at 153. Instead, respondent cites only that portion of *Knote* which states the unobjectionable proposition that a pardon "affords no relief for what *has been* suffered by the offender in his person by imprisonment, forced labor, or otherwise" *prior* to his pardon. *Id.* at 153-54 (emphasis added).

As to *Carlesi v. New York*, 233 U.S. 51 (1914), respondent correctly notes that the Court held that a State could treat a defendant as a repeat offender for sentencing purposes based on a pardoned conviction. *See id.* at 55-56. But respondent overlooks *Carlesi*'s admonition that, "if the act of the state in taking into consideration a [pardoned] conviction * * * was in any

2. Instead, respondent focuses almost entirely on this Court's decision in *Garland*, claiming that the Court's lengthy discussion of the pardon power was "dictum" because the Court indicated that the law at issue was also unconstitutional as a bill of attainder and *ex post facto* law. *See* Opp. 16-18. Although the latter is unquestionably true, *see Garland*, 71 U.S. at 377-78, that suggests at most that the Court's discussion of the Pardon Clause was in the nature of an alternative holding, rather than pure dictum.

Respondent nevertheless doggedly maintains that lower courts have "almost universally" interpreted *Garland*'s discussion of the pardon power as dictum. Opp. 17. That claim is utterly belied by the fact that the passage of *Garland* discussing the scope of the pardon power has been quoted at least 41 times by federal and state courts (including repeatedly by this Court) — and cited innumerable times more. Even the small sample of those cases which respondent cites do not characterize *Garland*'s *entire* discussion of the pardon power as "dictum," but instead assert that *Garland* stands only for the more modest proposition that a presidential pardon nullifies those disabilities that attach automatically as a result of the conviction itself — and not for the broader proposition, as some language in *Garland* suggests, that a pardon "blots out guilt" more generally by nullifying even disabilities that are based on the same *conduct* that underlies the conviction. *See, e.g.*, *In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (referring to *Garland*'s "dictum about blotting out guilt"); *United States v. Noonan*, 906 F.2d 952, 958 (3d Cir. 1990) (rejecting view that a pardon "vitiate[s] guilt," but accepting Williston's view that a pardon "removes all legal punishment for the offense"); *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975) (similarly rejecting *Garland*'s "suggest[ion]" that a pardon "blots out" guilt and accepting Williston's view). As discussed

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just sense a punishment for such prior crime," the act would be void. *Id.* at 57.

in our petition, the decision of the court below cannot be reconciled even with such a narrower interpretation of the pardon power. *See* Pet. 10-12.

3. Respondent seeks to distinguish other authorities on which petitioner has relied, including the Office of Legal Counsel's memorandum on the scope of the pardon power, on the ground that they involve the disbarment of an attorney based solely on the record of a conviction *after* the conviction has been pardoned. *See* Opp. 20 n.8. But this is a distinction without a difference — and respondent identifies no authority that draws it. It would be both nonsensical and inequitable to bar an individual from automatic reinstatement because he did not receive his pardon until after his disbarment, but to allow a similarly situated individual to obtain automatic reinstatement simply because he received his pardon more expeditiously. Indeed, far from drawing such a distinction, OLC's memo on the scope of the pardon power affirmatively takes the position that a pardon has the same effect regardless of when it occurs — even if it occurs *before* a conviction is actually entered. *See* Office of Legal Counsel, United States Department of Justice, Memorandum for the Pardon Attorney, June 19, 1995, *available at* http://www.usdoj.gov/olc/pardon3.19.htm.[2]

4. Respondent contends that there is no abiding conflict between the lower court and the Seventh Circuit, notwithstanding that court's decision in *Bjerkan*, in light of its subsequent decision in *Grossgold v. Supreme Court of Illinois*,

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[2] Similarly, respondent seeks to distinguish another case, *Ex parte Crisler*, 132 So. 103 (Miss. 1931), on the ground that the order of disbarment at issue there was entered at the same time as the criminal sentence, rather than in a separate disciplinary proceeding. *See* Opp. 15 n.6. Again, however, respondent fails to explain why this distinction is of constitutional import. There is no question in this case that, once petitioner was convicted, his disbarment was inevitable; the mere fact that the order of disbarment was separately entered is hardly surprising, since the conviction occurred in a different jurisdiction.

557 F.2d 122 (7th Cir. 1977). *See* Opp. 19-20, 22 n.12. As the Illinois Supreme Court's earlier decision in *Grossgold* indicates, however, that case did not involve a disbarment that attached *automatically* as a result of a pardoned conviction. *See In re Grossgold*, 317 N.E.2d 45, 47 (Ill. 1974). Unlike the D.C. Code provision at issue here, the relevant provision of Illinois law states that the existence of a conviction for a crime involving moral turpitude does *not* automatically lead to disbarment, but instead merely triggers the issuance of an order to show cause, in response to which an attorney may offer mitigating evidence on his behalf. *See* Ill. S. Ct. R. 761(b).[3] In fact, Illinois courts have expressly noted that an attorney's "actual conduct" may be taken into account in determining the appropriate sanction in cases involving crimes of moral turpitude. *See, e.g., In re Crane*, 178 N.E.2d 349, 400-01 (Ill. 1961). *Grossgold* thus stands only for the indisputable proposition that a presidential pardon does not relieve an attorney from discipline *altogether* — not for the more ambitious proposition that a presidential pardon does not relieve an attorney from *any type* of discipline. *See* 557 F.2d at 126. Nothing in *Grossgold* undermines *Bjerkan*'s broad holding that a presidential pardon nullifies *all* disabilities that attach *solely* by virtue of the underlying federal conviction. The D.C. Court of Appeals' decision cannot be reconciled with *Bjerkan*, and *certiorari* is warranted on that basis as well.

5. Respondent cites two state-court decisions for the proposition that the decisions of lower courts are "consistent" with that of the D.C. Court of Appeals. *See* Opp. 19-21. To the extent that respondent's characterization of those decisions is

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[3] Other States have widely varying practices, with some (like the District of Columbia) imposing automatic disbarment upon proof of a conviction for a crime involving moral turpitude, *see, e.g.*, Tex. Gov't Code § 81.078(c), and others (like Illinois) allowing an attorney to demonstrate that a suspension from practice would be inappropriate notwithstanding such a conviction, *see, e.g.*, Cal. Bus. & Prof. Code § 6102(a).

correct — and at least one of those decisions involves the scope of *gubernatorial*, not *presidential*, pardon power, *see In re Lavine*, 41 P.2d 161, *modified*, 42 P.2d 311 (Cal. 1935) — the mere fact that other decisions have come out the *same* way as the decision below does not contravene the fact that decisions of this Court, and at least one federal court of appeals, have come out the *other* way. The existence of those other decisions merely illustrates, if further illustration were necessary, that the issue raised by this petition is a recurrent one meriting this Court's review.

B. Respondent advances a number of other arguments in an attempt to convince this Court that *certiorari* is not warranted. Those arguments lack merit.

1. Respondent devotes a substantial portion of its brief in opposition to a discussion of the conduct underlying petitioner's 21-year-old criminal convictions for conspiracy to commit bribery and related offenses, and of the subsequent procedural history. *See* Opp. 3-9. Specifically, respondent emphasizes petitioner's unwillingness to testify against Alcee Hastings, the alleged recipient of the bribes. *See id.* at 5-6, 7, 8. As a preliminary matter, the nature of petitioner's conduct is simply irrelevant to the constitutional question presented here: however egregious that conduct, if petitioner's disbarment rested *solely* on his conviction for that conduct, it must fall along with the conviction upon receipt of a pardon. Respondent all but ignores the fact that the court below has recognized that petitioner has expressed remorse for his conduct, *see In re Borders*, 665 A.2d 1381, 1383 (D.C. 1995); has acknowledged that petitioner is competent to practice law, *see id.*; and has conceded that petitioner's character witnesses are "admittedly impressive," *id.* at 1385. To the extent the equities are relevant here, they weigh in favor of, not against, petitioner, and in favor of granting *certiorari*.

2. At various points, respondent rests on the broad power of States (and Congress, in the case of the District of Columbia)

to protect the integrity of the legal profession. *See, e.g.*, Opp. 10. That power is undoubted — as is the power of States more specifically to establish standards for the ethical conduct of attorneys. And it is precisely on that basis that courts have established rules disciplining attorneys for engaging in conduct that may *also* be the subject of a criminal conviction — such as "conduct involving dishonesty, fraud, deceit or misrepresentation," or "conduct that seriously interferes with the administration of justice." D.C. Rule of Professional Conduct 8.4. Again, however, where States choose to make disciplinary sanctions turn entirely on the existence of a criminal *conviction*, rather than any independent determination regarding the underlying *conduct*, those sanctions constitute disabilities attendant to the conviction, and therefore must fall when the conviction is pardoned. Because respondent could pursue sanctions against petitioner under other disciplinary provisions, *see* Pet. 16 n.11, a ruling in petitioner's favor would not somehow endanger the ability of District of Columbia courts to "ensure the competency and moral fitness of its members," Opp. 1. This policy interest thus does not weigh against the granting of *certiorari*.

3. Respondent next notes that D.C. Code § 11-2503(a) suggests that reinstatement to the Bar in these circumstances is permissive, rather than mandatory, and adds that the legislative history supports that construction. *See* Opp. 12-13. It is plain, however, that Congress may not circumscribe the scope of the President's pardon power. *See, e.g., Schick v. Reed*, 419 U.S. 256, 266 (1974); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1871). To the extent that D.C. Code § 11-2503(a) does suggest that reinstatement is anything other than mandatory upon receipt of a pardon for the conviction on which the disbarment rested, it is quite simply unconstitutional. The mere fact that Congress may have *intended* that reading of the statute — as is presumably the case whenever a statute is enacted whose constitutionality is subsequently called into question —

provides no reason to deny *certiorari*.

4. Respondent attempts to insinuate that petitioner's disbarment did not attach automatically upon receipt of his conviction because it required a "disciplinary proceeding" to make a "finding" that the convictions were for crimes involving moral turpitude. *See* Opp. 14-15. It is beyond question, however, that the "disciplinary proceeding" in this case was a mere formality, involving only a mechanical determination (made without even a hearing) that petitioner's criminal convictions were for offenses in the class covered by the statute. As respondent concedes, *see id.* at 5, 14-15, that determination was controlled by an earlier decision of the D.C. Court of Appeals, *see In re Colson*, 412 A.2d 1160, 1168 (D.C. 1979) (*en banc*). And that determination did not turn on specific findings regarding the facts of petitioner's actual conduct, but instead turned only on the *category* of crime for which petitioner had been convicted. *See id.* at 1164. As we have already noted, *see supra* p. 4 n.2, it would elevate form over substance to suggest that petitioner should not be entitled to reinstatement simply because his disbarment occurred in a "disciplinary proceeding," rather than a "criminal sentencing," Opp. 15. Because petitioner's disbarment inevitably flowed from his subsequently pardoned conviction, the constitutional question is squarely presented here, and *certiorari* is warranted.

C. Finally, respondent contends that the decision below, if allowed to stand, will not have far-reaching implications. *See id.* at 22-23. In this respect, too, respondent errs.

1. In our petition, we contended that the decision below will allow a wide range of disabilities that depend solely on a federal conviction — such as restrictions on the rights to vote and carry firearms — to remain in effect even when the underlying conviction has been nullified by a presidential pardon. *See* Pet. 15-16.[4] Respondent's sole answer is that this

[4] A study released in the last few days estimates that more than four million

case "does not concern a disability or punishment imposed for a pardon." Opp. 22. But respondent cannot seriously argue that deprivation of the right to practice one's chosen profession does not, at a minimum, constitute a "disability" at least as severe as the deprivation of other rights. Indeed, respondent entirely ignores that portion of this Court's decision in *Garland* which states that deprivation of the right to practice law does not merely constitute a disability, but rises to the level of *punishment* for the underlying offense. *See* 71 U.S. at 377 (noting that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct"). Because this case concerns at least a "disability" imposed for a conviction, if not a "punishment," respondent's claim that the decision below is limited to the specific context of disbarment reflects little more than wishful thinking.

2. Respondent suggests that this case is of limited significance because petitioner could receive the same sanction in subsequent proceedings under other disciplinary provisions. *See* Opp. 23 n.13. Even if it were certain (and it manifestly is not) that disbarment would result from subsequent proceedings, that is no excuse for failing to turn square constitutional corners. In any event, as the aggressive manner in which respondent has litigated this case amply demonstrates, it is far from clear that disbarment would still result: whereas *petitioner* would bear the burden of proof, by clear and convincing evidence, as to his rehabilitation in any subsequent *reinstatement* proceedings if the decision below were allowed to stand, *see* D.C. Bar R. 11, § 16(d), *respondent* would bear the burden of proof, again by clear and convincing evidence, as to petitioner's guilt in any subsequent *disciplinary* proceedings if

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Americans are barred from voting under state law because they have been convicted of felonies. *See* Sentencing Project, *Legislative Changes on Felony Disenfranchisement, 1996-2003*, Sept. 2003, at 1, *available at* http://www.sentencingproject.org/pdfs/legchanges-report.pdf.

the decision below were invalidated, *see, e.g., In re Slattery*, 767 A.2d 203, 208 (D.C. 2001), and would further have to demonstrate that an additional period of disbarment would be the appropriate sanction. Indeed, it is far from clear that respondent would even decide to pursue further charges against petitioner, in light of the fact that petitioner has already been suspended from the practice of law for more than twenty years — not to mention the fact that petitioner's reinstatement to the Bar has become something of a *cause célèbre*. *See, e.g.*, William Raspberry, *Pardoned But Still Disbarred*, Wash. Post, June 23, 2003, at A21.

This case is of significance not just to petitioner, but to the many other recipients of presidential pardons. The decision below has broad implications and is inconsistent with fundamental constitutional principles. *Certiorari* should be granted.

CONCLUSION

The Court should grant the petition for *certiorari*. Alternatively, in light of the fact that this case implicates a core executive power, the Court should call for the views of the Solicitor General.

Respectfully submitted,

KENNETH W. STARR
KANNON K. SHANMUGAM
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

CHARLES J. OGLETREE, JR.
Counsel of Record
HARVARD LAW SCHOOL*
516 Hauser Hall
Cambridge, MA 02138
(617) 495-5097

* *affiliation given for associational purposes only*

September 30, 2003

(3)

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IN THE

Supreme Court of the United States

WILLIAM A. BORDERS, JR.,
Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF BAR COUNSEL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL BAR ASSOCIATION IN SUPPORT OF APPELLANT WILLIAM A. BORDERS, JR.

LINNES FINNEY, JR.*
DANIEL B. SNELLINGS
GARY, WILLIAMS, PARENTI,
FINNEY, LEWIS, MCMANUS,
WATSON & SPERANDO, P.L.
320 South Indian River Drive
Fort Pirce, FL 34950
(772) 464-2352

* Counsel of Record

Counsel for Amicus Curiae

September 15, 2003

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IN THE

Supreme Court of the United States

No. 03-246

WILLIAM A. BORDERS, JR.,
Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF BAR COUNSEL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL BAR ASSOCIATION IN SUPPORT OF APPELLANT WILLIAM A. BORDERS, JR.

INTEREST OF *AMICUS CURIAE*[1,2]

The National Bar Association ("NBA"), founded in 1925, is the nation's oldest and largest national association of predominantly African-American lawyers and judges. It has 84 affiliate chapters throughout the United States and affiliations in Canada, the United Kingdom, Africa and the

[1] This brief has been authored by Linnes Finney, Jr. and Daniel B. Snellings on behalf of the NBA. No person or entity has made any monetary contribution to this brief.

[2] In addition to the NBA, this *Amicus* Brief is endorsed by the Washington Bar Association, a voluntary bar association which is an affiliate of the NBA.

Carribean. The NBA represents a professional network of over 22,000 lawyers, judges, educators and law students.

Over the past twenty years the NBA has authored a number of *amicus curiae* briefs before the United States Supreme Court. These previous briefs pertained to fundamental Constitutional issues of equality and justice for which the NBA strives for our country to achieve. The latest brief was in 2000, when the NBA submitted an *amicus curiae* brief in *Bush v. Gore* on behalf of respondents regarding the electoral process.

The NBA's interest in the instant case is based upon three facts. First, William A. Borders, Jr. is a past-president of the NBA, having served with distinction in that capacity in 1980; second, in 1999 the organization passed a resolution officially supporting Borders re-admission based upon his documented rehabilitation and his continued commitment to the principles of justice and equality; and third, this case touches upon Constitutional separation of power issues as well as the fundamental right to work of Mr. Borders.

Pursuant to S.CT. Rule 37.2(a), written consent has been obtained from all parties to this case, and filed into the record.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1983, Petitioner William A. Borders, Jr. was disbarred by the D.C. Court of Appeals in an unpublished order. Disbarment was solely based upon Mr. Borders' conviction of an offense involving moral turpitude as set forth in D.C. Code § 11-2503(a).

On January 20, 2001, President Clinton issued a full and unconditional pardon to Borders. Following his pardon, Borders filed a motion with the D.C. Court of Appeals to vacate its Order of Disbarment on the ground that the Presidential Pardon nullified his convictions as well as his

disbarment, which was based solely upon his convictions. The D.C. Court of Appeals denied Mr. Borders' motion to vacate his disbarment based solely upon the discretion allowed to them by D.C. Code § 11-2503(a).

ARGUMENT

I. THE D.C. COURT OF APPEALS' DECISION IMPERMISSIBLY RESTRICTS THE POWER OF THE PRESIDENT AS SET FORTH IN ARTICLE II, SECTION 2 OF THE UNITED STATES CONSTITUTION.

Article II, Section 2, of the United States Constitution grants the President the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. This power is absolute and is not subject to legislative restriction.

Our democratic system imposes upon the three branches of government a degree of overlapping responsibility, a duty of interdependence as well as independence, the absence of which would preclude the establishment of a Nation capable of governing itself effectively. *Mistretta v. United States*, 488 U.S. 361, 381 (1989), quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

Within this overlapping interdependence is the doctrine of separation of powers. In this case there is a separation of powers conflict between a legislative enactment codified in D.C. Code § 11-2503(a) and the powers of the President as set forth in the United States Constitution. To resolve this conflict "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137 (1803).

In *United States v. Klein*, 80 U.S. 128, (1872) this Court stated that "the President's power of pardon is not subject to legislation; Congress can neither limit the effect of his

pardon, nor exclude from its exercise any class of offenders." *See Id.* at 141. Further, this Court stated in *Klein* that "to the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences." *See Id.* at 147. By enacting D.C. Code § 11-2503, Congress has restricted the Presidential pardon power and has "inadvertently passed the limit which separates the legislative from the executive power as stated in *Klein*." *See Id.* at 147. *Klein* is still the law, as cited in *Clinton v. Jones*, 520 U.S. 681 (1997); and *Miller v. French*, 530 U.S. 327 (2000).

D.C. Code § 11-2503(a) states that "Upon granting of a pardon to a member so convicted, the court may vacate or modify the order of disbarment." Such a restriction upon a Presidential Pardon is contrary to *Klein*, as well as a continuous line of jurisprudence dating back to as early as the 1830's.

In *United States v. Wilson*, 32 U.S. 150 (1833), this Court stated that:

> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted upon. *See Id.* at 161.

Or as stated more succinctly in *United States v. Padelford*, 76 U.S. 531 (1869), the effect of a Presidential Pardon is that in the eye of the law the offender is as innocent as if he had never committed the offense. *Id.* at 542.

This Court set forth the history of the Presidential Pardon power in *Schick v. Reed*, 419 U.S. 256 (1974). In *Schick* this Court stated, in essence, that the executive pardoning power is consistent with the English common law practice which existed in 1787. That is, the President has the power to grant reprieves and pardons, but his pardon shall not be pleadable in bar of an impeachment. *See Id.* at 262. This limitation as to impeachment tracked a similar restriction upon the English royal prerogative which existed in 1787. *4 W. Blackstone, Commentaries* *399-400. The *Schick* court went on to state that the Presidential pardoning power was intended to be generally free from legislative control. *See Id.* at 263.

This point was enlarged by Hamilton in his Federalist No. 74 which stated, in part:

> [H]umanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. . . It may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. *The Federalist No. 74*, pp. 500-501 (J. Cooke ed. 1961).

Further, as stated by Justice Marshall in *United States v. Wilson*, *supra*, "as this power (pardon power) had been exercised from time immemorial by the executive of that nation whose language is our language, and whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon."

In *Ex Parte Wells*, 18 How. 307 (1856) this Court was confronted with the issue of whether a President may confer a "conditional" pardon. In holding in the affirmative, this Court reasoned that the power to pardon extends to all kinds of pardons known in the law, and a conditional pardon is one of them. *See Id.* at 314. The *Wells* court went on to state that the

very essence of the pardoning power is to treat each case individually. *See Id.* at 314-315. The *Amici* asserts that, in essence, this allows the President, if so desired, to limit the pardon of an individual such that all disabilities are not extinguished by the President. Consequently, if an unconditional pardon is given by the President, as in the case of Mr. Borders, no such condition or disabilities are imposed upon that person pardoned and all disabilities incurred as a result of the conviction are removed.

As stated in *Schick*, the teachings of *Wilson* and *Wells* have been followed consistently by this Court. *Schick* at 266, citing *Ex Parte Grossman*, 267 U.S. 87 (1925); *Ex Parte Garland*, 4 Wall 333 (1867). In showing the strength of this precedent the *Schick* court quoted Justice Holmes in *Jackman v. Rosenbaum*, 260 U.S. 22 (1922) that "if a thing has been practiced for two hundred years by common consent, it will need a strong case to overturn it." *Id.* at 31.

Lastly, the *Schick* Court in utilizing the above reasoning held that "a fair reading of the history of the English pardoning power and the unbroken practice of this court since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress." *Schick* at 266.

The language of D.C. Code §11-2503(a) that "Upon granting of a pardon to a member so convicted, the court may vacate or modify the order of disbarment" is a restriction upon a Presidential pardon and is contrary to *Klein* as well as a continuous line of jurisprudence. The legislative act impermissibly limits the President's power to grant full pardons as envisioned by the Constitution.

II. THE D.C. COURT OF APPEALS' DECISION CONSTITUTES A DISABILITY IMPOSED UPON THE APPELLANT WHICH CONFLICTS WITH THE LAW OF THE UNITED STATES SEVENTH CIRCUIT COURT OF APPEALS.

As stated by the Judiciary Committee, in its *To Amend the Code of the District of Columbia: Hearings on H.R. 14974 Before the House Comm. On the Judiciary*, 64th Cong. 1st Sess 63 (1916), the right to work is a very serious property right. *See Id.* at 65. The court below appear to place significant emphasis upon certain limited statements made during the Judiciary Committee Hearing on the enactment of D.C. Code § 11-2503(a). The *Borders* Court cites *In Re McBride*, 602 A.2d 626 (D.C. App. 1992), for its emphasis that in proposing adoption of the amendment the House Committee on the Judiciary "explained that a pardon would not automatically reverse any disbarment, rather the decision to reinstate after the pardon remained with the court." *McBride* at 939 (citing *To Amend the Code of the District of Columbia: Hearings on H.R. 14974 Before the House Comm. On the Judiciary*, 64th Cong. 1st Sess 63 (1916). A closer review of this Committee hearing yields, however, strong conflicting messages.

A reading of the transcript from the hearing reflects that there was no consensus among the Judiciary Committee that a pardon would not reverse a disbarment. In fact the Chairman of the Committee, Edwin Webb of North Carolina, stated that a pardon should restore a disbarred member to the practice of law. *See Id.* at page 65. The Chairman went on to state that "a pardon restores everything else. It restores the right to vote, and I do not see why it should not restore the right to make a living." *Id.* In response to this remark, Mr. Tobriner, who headed the committee representing the Bar Association of the District of Columbia, replied, "It is a property right." to which the Chairman replied, "Certainly it is, and a very serious right, too." *Id.*

The hearing transcript, although only several pages, clearly suggests that the Judiciary Committee was strongly divided on this issue. Accordingly, reliance by the *Borders'* Court upon limited comments without comment upon significant contradicting comments is questionable.

It has been stated that the right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty, and happiness. As early as 1915, the United States Supreme Court declared that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of [the Fourteenth] Amendment to secure. *Truax v. Raich*, 239 U.S. 33, 41 (1915).

In the medical license denial case of *Barsky v. Board of Regents*, 347 U.S. 442 (1954), Justice Wendell Douglass wrote in his dissent that:

> The right to work, I had assumed, was the most precious liberty that man possesses. The American ideal was stated by Emerson in his essay on Politics. 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on a curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit strength against the forces of nature, to match skills with his fellow man.

In *Bjerkan v. United States*, 529 F.2d 125 (7th Cir. 1975) it was held that a Presidential Pardon releases all disabilities imposed by the offense. The *Bjerkan* court held that any deprivation or suspension of any inalienable rights, of which, the pursuit of happiness of all avocations and all positions are alike, open to everyone, constitutes punishment. *Id.* at 128. As such, the deprivation of a person's basic inalienable

rights, including the right to work in certain professions, constitutes punishment and that such punishment would constitute a restriction on the Presidential Pardon power. *Id.*

Thus, the denial by the Court below of Mr. Borders' right to work in his chosen profession constitutes a punishment or disability that has been held by the Seventh Circuit to be an impermissible restriction of the Presidential Pardon power. The *Borders'* decision below is thus contrary to the law of the United States Seventh Circuit Court of Appeals that a Presidential Pardon releases the offender from all disabilities imposed by the offense as stated in *Bjerkan.*

It is undeniable that the denial of Mr. Borders' right to work is a disability imposed upon Mr. Borders. If President Clinton had so desired to have this disability remain he could have and would have granted Mr. Borders a "conditional" pardon with that condition. The fact remains that President Clinton did not grant Mr. Borders a "conditional" pardon, but a full and unconditional pardon.

The word "full" as defined by the Oxford University Press means "not lacking or omitting anything, complete." The word "unconditional" as defined by the Oxford University Press means "not subject to any conditions." The D.C. Court of Appeals' decision to deny Mr. Borders his right to work in his chosen profession based solely upon his prior conviction pursuant to D.C. Code §11-2503(a) is an impingement upon the Presidential pardon power and should be vacated.

In *Re Abrams*, 662 A.2d 867 (D.C. App. 1995) the facts almost completely mirror our case below. In *Abrams* the D.C. Court of Appeals had to determine whether to reinstate Mr. Abrams, a disbarred attorney who had received a full and unconditional Presidential pardon. In *Abrams*, however, the D.C. Court of Appeals allowed for reinstatement, the basis of which mirrors the argument of Petitioner in this case.

The *Abrams* court concluded that the suspension from the practice of law would have a punitive impact on an attorney and thus a full and unconditional pardon protected him from any kind of official disciplinary or punitive response. Further the *Abrams* court stated that an unconditional pardon bars the government from penalizing the offender in any way for the conduct underlying the pardon.

The *Abrams* court stated that "disciplinary proceedings against a member of the bar, although intended to protect the public and preserve the integrity of the legal profession, nevertheless have the additional effect of punishing the sanctioned attorney. *Id.* citing *In re Ruffalo*, 390 U.S. 544 (1968). Disciplinary matters are adversary proceedings of a quasi-criminal nature. *Id.* at 551. Exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. *Abrams at 877* citing *Garland* at 377.

In reaching its decision the *Abrams* court concluded that "any deprivation of a person's basic civil rights, including the right to vote, the right to serve on juries, and the *right to work in certain professions* on account of a federal conviction will constitute a restriction on the legitimate, constitutional power of the President to pardon an offense against the United States and will be void as circumscribing and nullifying that power. *Id.* at 879 citing *Bjerkan* at 128.

This opinion in *Abrams* is consistent with this Court's interpretation and application of the pardon power as stated in *Wilson, Wells, In Re Garland, United States v. Klein, Ex Parte Grossman*, and *Schick v. Reed, supra.*

In fact, the D.C. Court of Appeals states in the *Abrams* opinion that it has laid out the history of these preceding Supreme Court cases to highlight two significant features of a full and unconditional Presidential Pardon. First, the Court has made it clear that such a pardon attaches not just to a

criminal conviction, but also to the conduct which is or may be the basis of a conviction. *Abrams* at 876. Second, because the pardon attaches to the underlying conduct, the Court has established that a pardoned offender enjoys immunity not only from a criminal prosecution, but also from any other form of punishment or civil disability imposed as a consequence of his actions. *Id.*

Although the opinion in the *Borders*' court below is contrary to its position in *Abrams,* the court below distinguished the *Abrams* and *Borders* cases on two premises. First, the *Borders*' court distinguished that *Abrams*' conviction did not stem from the application of §11-2503(a) and did not involve a conviction of a crime of moral turpitude. It is of import to note, however, that the alleged misconduct of Abrams involved the veracity of his sworn testimony before the House Intelligence Committee investigating Iran-Contra. This misconduct, if it had been proven, would have amounted to a crime of moral turpitude. Thus, the court below distinguished *Borders* and *Abrams* based upon the conviction only and not the conduct surrounding the conviction.

Secondly, the *Borders*' court distinguished the *Borders* and *Abrams* cases based upon the fact that in *Abrams* the pardon was issued before the attorney was disciplined and in *Borders* the pardon came after the attorney was disciplined. The meaningfulness of this distinction, however, was not set forth by the court below except to note said distinction.

Thus, it appears the D.C. Appeals Court's basis denying Mr. Borders' reinstatement is because he was pardoned after conviction of a crime of moral turpitude. In *Chaunt v. United States*, 364 U.S. 350 (1960) this Court held that Petitioner's naturalization decree could not be set aside lightly and remanded the case back to the Ninth Circuit to determine whether the evidence of Petitioner's acts of moral turpitude were clear, unequivocal and convincing so as to leave no doubt of the issue. In the *Chaunt* dissent of Justices Clark,

Whittaker and Stewart, it was noted that the intentional concealment of a material fact and a willful misrepresentation of the petitioner was not in dispute and that such offenses involve moral turpitude. *Id.* at 357. These Justices further noted that the felony in that case reflected upon the character of the man seeking citizenship and strips the offender of all civil rights and leaves a shattered character that "only a presidential pardon can mend. *Id. at 358.*

The D.C. Appeals Court's denial of Mr. Borders' reinstatement because he was pardoned after conviction of a crime of moral turpitude, however, flies in the face of *Garland.* In *Garland,* the pardon occurred after the conviction of Attorney Garland for various acts of treason and other crimes of moral turpitude against the United States. Thus, this said distinction in *Borders* is contrary to the law as set forth by this Court in *Garland.* It is noteworthy that Mr. Garland, after re-admission, went on to become the Attorney General of the United States, and serve this country with distinction throughout the remainder of his life.[3] Like Mr. Garland, Mr. Borders has been granted a full unconditional pardon by the President of the United States and should be reinstated to practice law and thus be granted the opportunity to practice law with distinction.

CONCLUSION

It is the considered opinion of the *Amici* that Mr. Borders has been rehabilitated and is worthy to once again practice law. More importantly, it is the opinion of the President that Mr. Borders is rehabilitated and worthy of a full and unconditional Presidential Pardon. This decision cannot be questioned. The D.C. Court of Appeals, however, has modified and placed a restriction upon Mr. Borders' pardon. This restriction and/or modification is unconstitutional and con-

[3] Ironically, he died on January 26, 1899, in Washington DC, while arguing a case before the Supreme Court.

trary to the law of this Honorable Court, as well as the law of the Seventh Circuit Court of Appeals. For the above and foregoing reasons, *Amici* joins Petitioner in seeking a reversal of the D.C. Court of Appeals' ruling and to reinstate Mr. Borders back to the practice of law.

Respectfully submitted,

LINNES FINNEY, JR.*
DANIEL B. SNELLINGS
GARY, WILLIAMS, PARENTI,
FINNEY, LEWIS, MCMANUS,
WATSON & SPERANDO, P.L.
320 South Indian River Drive
Fort Pirce, FL 34950
(772) 464-2352

* Counsel of Record

Counsel for Amicus Curiae

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